UC SOUTHERN REGIONAL LIBRARY FACILITY
AA 000 836 057 0

en or pencil marks.

UNIVERSITY
OF CALIFORNIA
LOS ANGELES

SCHOOL OF LAW
LIBRARY

Gift of
Howard Surr

A TREATISE

ON THE

LAW OF BILLS OF LADING.

BY

WILLIAM W. PORTER,

OF THE PHILADELPHIA BAR.

PHILADELPHIA:
KAY AND BROTHER,
LAW BOOKSELLERS, PUBLISHERS, AND IMPORTERS.
1891.

T
P8358b
1891

Entered according to Act of Congress, in the year 1891, by
WILLIAM W. PORTER,
in the Office of the Librarian of Congress, at Washington.

COLLINS PRINTING HOUSE,
705 Jayne Street.

RJF 18 June 94

PREFACE.

This is believed to be the first American work on the law relating to Bills of Lading. The subject has been touched upon in text books on kindred subjects, but is worthy of a more extended treatment.

The work of the author has been done in spare moments, in the midst of the pressure incident to active practice. This fact may serve to explain and excuse some of the defects which less interrupted labor might have excluded.

WILLIAM W. PORTER.

July, 1891.

306217

TABLE OF CONTENTS.

CHAPTER I.

DEFINITION OF A BILL OF LADING—ITS KIND, CONTENTS, PARTIES AND OFFICES.

§ 1. Definition of a bill of lading.
§ 2. What are not bills of lading.
§ 3. The several kinds of bills of lading.
§ 4. Contents of the bill.
§ 5. The original parties to the bill.
§ 6. By whom bills may be given.
§ 7–10. Who are common carriers.
§ 11. Bills of lading contracts for diminished liability.
§ 12. The consideration paid for transportation—freight.
§ 13. The offices of the bill—a receipt, a contract and a muniment of title.

CHAPTER II.

A BILL OF LADING IS A RECEIPT AND ITS TERMS MAY BE VARIED BY PAROL PROOF AS BETWEEN THE ORIGINAL PARTIES, AS TO THE DESCRIPTION OF THE GOODS AND AS TO THEIR WEIGHT AND QUANTITY.

§ 14. The bill is a receipt and its recitals may be varied by parol proof as between the original parties.
§ 15. The bill is not conclusive evidence of delivery to the carrier.
§ 16. Illustrations of the principle.
§ 17. The bill is *prima facie* evidence of such delivery.
§ 18. Effect of a bill executed before reception of the goods.
§ 19. Effect of a bill receipting for goods improperly described.
§ 20. Misdescription by shipper inducing less degree of care.
§ 21. Instances of misdescription.
§ 22. Further instances.
§ 23. Misdescriptions to secure lower rate of freight.
§ 24. Misdescription by the carrier.
§ 25. Statement of weight and quantity only *prima facie* evidence of amount.
§ 26. Carrier not bound by the statement of quantity.
§ 27. Illustrations of the principle.
§ 28. Contrary doctrine in Georgia.
§ 29. Neither the shipper nor consignee bound by the statement of quantity.
§ 30. Effect of the statement of quantity on the burden of proof.
§ 31. "Quantity guaranteed" and similar provisions.
§ 32. Effect of the qualification "more or less."

CHAPTER III.

A BILL OF LADING IS A RECEIPT, CONTINUED.—EFFECT OF THE STATEMENT OF VALUE, OF THE CLAUSE "SAID TO CONTAIN," OF STATEMENT OF THE CONDITION AT TIME OF SHIPMENT.

§ 33. Effect of the statement of the value of the goods.
§ 34. Effect of knowledge by the carrier of the true value.
§ 35. Shipper not bound to state value unless asked.
§ 36. Legislation requiring the shipper to state value.
§ 37. Shipper, if asked, must state value truly.
§ 38. Shipper must not deceive the carrier as to value by the manner of shipping.
§ 39. Illustrations of the principle.
§ 40. Further illustrations.
§ 41. The question of fraud may be for the court or for the jury.
§ 42. Effect of the qualification "said to contain."
§ 43. Effect of the statement "received in good order and condition," generally.
§ 44, 45. Statement refers to external or apparent condition.
§ 46. The reason for the rule.
§ 47. The statement of condition is not conclusive.
§ 48. Illustrations of the principle.
§ 49. The statement is *prima facie* evidence of the condition and puts *onus* on the carrier to disprove.
§ 50. A promise to deliver in good condition implies receipt in same.
§ 51, 52. Effect of the phrase "apparent good condition."

CHAPTER IV.

EFFECT OF QUALIFYING CLAUSES, "CONTENTS UNKNOWN," "WEIGHT UNKNOWN," ETC.

§ 53. "Quantity, etc., unknown" generally.
§ 54. "Contents unknown," as affecting the description of goods.
§ 55. "Contents unknown," as affecting the statement of the condition of the goods.
§ 56. "Contents and gauge unknown."
§ 57. "Contents and value unknown."
§ 58. "Weight unknown."
§ 59. "Contents and weight unknown."
§ 60. "Quantity and quality unknown."
§ 61, 62. "Weight, contents and value unknown."

CHAPTER V.

A BILL OF LADING IS A CONTRACT—RULES OF CONSTRUCTION.

§ 63. A bill of lading is a contract.
§ 64. As such it cannot be varied in its terms by parol proof.
§ 65. Nor by contemporaneous verbal agreement.
§ 66. Verbal agreement is not merged where terms are omitted by mistake from the bill.
§ 67. Illustrations of the principle.
§ 68. Variations of the rule.

§ 69, 70. Parol evidence is admissible to explain ambiguities.
§ 71. Contract is to be gathered from the whole instrument.
§ 72. Modification of the rule.
§ 73, 74. Reference to charter party.
§ 75, 76. Written prevail over printed provisions.
§ 77. The bill is to be construed according to the intention of the parties.

CHAPTER VI.

FURTHER RULES FOR CONSTRUING THE CONTRACT.

§ 78, 79, 80. The bill construed with reference to usage and custom.
§ 81. Limitations of the rule.
§ 82. Terms varied by custom or technical meaning.
§ 83. Usage as to course of voyage.
§ 84. Usage in conflict with positive law.
§ 85, 86. The bill construed with reference to custom as to stowage.
§ 87. The case of Lamb *v.* Parkman.
§ 88. Custom as to stowage continued.

CHAPTER VII.

CONFLICT OF LAWS IN CONSTRUING THE BILL OF LADING.

§ 89. The general rule as to the law that governs construction.
§ 90, 91. Consideration of the cases.
§ 92. The Iowa authorities.
§ 93, 94. Decisions in other States.
§ 95. Decisions in England.
§ 96. Decision by U. S. Supreme Court.
§ 97. "The law of the ship."
§ 98. Divergent opinions.
§ 99. "The law of the court."

CHAPTER VIII.

THE RIGHT OF CARRIERS TO LIMIT THEIR COMMON LAW LIABILITY.

§ 100. The law in England.
§ 101. Reduced freight a good consideration for diminished liability.
§ 102. Is the carrier with limited liability simply a bailee for hire?
§ 103, 104. Rule as to the right to limit liability as laid down by the Federal courts.
§ 105. Rule in Alabama.
§ 106. Rule in Arkansas.
§ 107. Rule in California.
§ 108. Rule in Colorado.
§ 109. Rule in Connecticut.
§ 110. Rule in Dakota.
§ 111. Rule in Delaware and Florida.
§ 112. Rule in Georgia.
§ 113. Rule in Illinois.
§ 114. Rule in Indiana.
§ 115. Rule in Iowa.
§ 116. Rule in Kansas.
§ 117. Rule in Kentucky.
§ 118. Rule in Louisiana.
§ 119. Rule in Maine.
§ 120. Rule in Maryland.
§ 121. Rule in Massachusetts.
§ 122. Rule in Michigan.
§ 123. Rule in Minnesota.
§ 124. Rule in Mississippi.
§ 125. Rule in Missouri.
§ 126. Rule in Nebraska.

§ 127. Rule in New Hampshire.
§ 128. Rule in New Mexico.
§ 129. Rule in New York.
§ 130. Rule in New Jersey.
§ 131. Rule in North Carolina.
§ 132. Rule in Ohio.
§ 133. Rule in Pennsylvania.
§ 134. Rule in South Carolina.
§ 135. Rule in Tennessee.
§ 136. Rule in Texas.
§ 137. Rule in Vermont.
§ 138. Rule in Virginia.
§ 139. Rule in West Virginia.
§ 140. Rule in Wisconsin.
§ 141. The general American rule.

CHAPTER IX.

LIMITATION OF LIABILITY TO A SPECIFIC SUM.

§ 142. Limitation of liability to a specific amount by notice and advertisement.
§ 143. Such notice is obligatory because intended to insure good faith.
§ 144. Limitation of liability to a specific amount by the terms of the bill of lading.
§ 145. Benefit of the limitation to carriers other than the one giving the bill.
§ 146. Effect of the limitation where the shipper is silent as to the real value.
§ 147. Effect of limitation where several articles are included in one package.
§ 148. Construction put upon limitation in Alabama case.
§ 149. Limitation does not relieve from liability for negligence.

CHAPTER X.

ACCEPTANCE OF THE BILL IS ASSENT TO ITS TERMS.

§ 150. Acceptance of the bill by the shipper is generally held to be an assent to its terms.
§ 151. Duty of the shipper to read the bill.
§ 152. In Massachusetts assent must be proven.
§ 153. So also in Illinois.
§ 154. Statutory enactment in Dakota.
§ 155. The rule in Georgia, Michigan, and Maryland.
§ 156. The rule in Ohio.
§ 157. Assent is not presumed as to limitation indorsed on the bill.
§ 158. Assent is presumed where the shipper is familiar with the terms.

CHAPTER XI.

EXECUTION OR ACCEPTANCE OF THE BILL BY AN AGENT OF THE SHIPPER, OR OF THE CARRIER.

§ 159. Authority of an agent, delivering goods to the carrier to bind the shipper.
§ 160. Knowledge of an authorized agent as to the manner of shipping, is the knowledge of the shipper.

§ 161. Rule in those States where assent to terms must be shown.
§ 162. Contract made by an agent in his own name benefits the real owner.
§ 163. A principal must adopt his agent's contract as a whole.
§ 164. Carrier having dealt with an agent cannot deny such agent's authority.
§ 165. Where goods are shipped by a vendor or by an agent of the consignee.
§ 166. Bill executed by an agent of the carrier.
§ 167. Agent not authorized to sign bills for goods not actually received and such bills are void.
§ 168. Contrary rule obtains in certain courts.
§ 169. Agent of the carrier must be duly authorized to sign bills.
§ 170. Who are authorized.
§ 171. Who are not authorized.
§ 172. Instructions to carrier's agent do not bind the shipper.
§ 173. Effect of an agent's agreement to make immediate delivery.
§ 174, 175. Limitations of agent's power to make a special contract.

CHAPTER XII.

BILL OF LADING EXECUTED BY THE MASTER OF A VESSEL.

§ 176. Authority of the master to sign bills of lading.
§ 177. Contract must be within the scope of the master's authority.
§ 178. Secret instructions to the master do not bind the shipper.
§ 179. Master cannot sign bills for lower rate of freight than the shipowner contracted for.
§ 180. Master has no authority to sign bills for goods not received.
§ 181. Effect of custom on this rule.
§ 182. Authority of ship broker to sign bills.
§ 183. Personal liability of the master under the bill of lading.

CHAPTER XIII.

EXCEPTIONS. EXPRESSIO UNIUS EST EXCLUSIO ALTERIUS—ACT OF GOD.

§ 184, 185. Expressio unius, etc.
§ 186. Expressio unius, etc., case of Gage *v.* Tirrell.
§ 187. Expressio unius, etc., general rule.
§ 188, 189. Act of God-Definitions.
§ 190, 191. Act of God—Losses within the exception.
§ 192. Act of God—Losses not within the exception.
§ 193. Act of God, the proximate cause.
§ 194. Act of God and negligence concurring.
§ 195. Amount of care necessary.
§ 196. Act of God and delay concurring.
§ 197, 198. Deviation and act of God concurring.
§ 199. Consent of shipper to deviation.
§ 200. Duty to protect goods after damage by act of God.
§ 201, 202. Act of God—Inevitable accident.

CHAPTER XIV.

EXCEPTIONS, CONTINUED.—ACCIDENTS OF MACHINERY—BARRATRY—COLLISION.

§ 203, 204. "Accidents of machinery," etc.
§ 205. "Barratry," definition.
§ 206, 207, 208. Acts held to be barratrous.
§ 209. Barratrous acts must be prejudicial to owner.
§ 210. Master who is also owner cannot commit barratry.
§ 211. Act of part-owner may be barratrous.
§ 212, 213. "Collision;" conditions under which it may arise.
§ 214. Duty to protect goods after collision.
§ 215. Collision not presumptively due to negligence.

CHAPTER XV.

EXCEPTIONS, CONTINUED.—DANGERS OF THE ROAD—ESCAPES—VICIOUSNESS—UNRULY ANIMALS—FIRE.

§ 216. "Dangers of roads," "Risk of boats."
§ 217. "Escapes, viciousness, injuries to unruly animals."
§ 218. "Escapes," etc., degree of care.
§ 219, 220. Consent of the owner as to manner of shipment does not relieve from consequences of negligence.
§ 221. Carrier is bound to prevent escapes.
§ 222. Carrier is not liable when consignee is not ready to receive live stock.
§ 223. "Fire," generally.
§ 224. What is loss by fire.
§ 225. To fire merely an incident to other loss, the exception does not apply.
§ 226. Exception does not relieve for consequences of negligence.
§ 227. Burden of proving the loss within the exception.
§ 228. Doctrine in Ohio.
§ 229. Rule in Federal Courts.
§ 230. Exceptions to be strictly interpreted.
§ 231. Exception co-extensive with liability.
§ 232, 233. Legislation affecting the exception fire.

CHAPTER XVI.

EXCEPTIONS, CONTINUED.—FREEZING—FROM WHATEVER CAUSE—HEAT—SUFFOCATION—FERMENTATION—INJURIOUS EFFECTS OF OTHER GOODS—DANGEROUS GOODS—INSUFFICIENT STOWAGE—JETTISON.

§ 234. "Freezing."
§ 235. Freezing after delay.
§ 236, 237. Freezing after delay by preceding carrier.
§ 238. "From whatever cause."
§ 239. "Goods carried on deck at shipper's risk."

§ 240, 241. "Heat"—"Suffocation"—"Fermentation."
§ 242. Heat, etc., the result of defective stowage.
§ 243. "Injurious effects of other goods"—"Dangerous goods"—"Insufficient stowage."
§ 244. Liability under the clause "where ship is under charter-party."
§ 245, 246. Illustrations of principles of the text.
§ 247. "Jettison"—Definition.
§ 248. Jettison—Effect of negligence.
§ 249, 250. Liability for deck load.

CHAPTER XVII.

EXCEPTIONS, CONTINUED.—LEAKAGE AND BREAKAGE—LACK OF FOOD—LOADING AND UNLOADING—OBLITERATION OF MARKS—OWNER'S RISK.

§ 251. "Leakage and breakage."
§ 252. Leakage and breakage—Effect of negligence.
§ 253. Leakage and breakage—Burden of proof.
§ 254. "Lack of food and water."
§ 255. "Loading or unloading."
§ 256. Loading or unloading—Obligation to furnish suitable cars.
§ 257. Rule in England, etc.
§ 258. Construction in Michigan court.
§ 259. "Obliteration of marks."
§ 260. "Owner's risk."
§ 261. Owner's risk—Negligence.
§ 262. Owner's risk—Effect of fraud or misrepresentation.
§ 263. Owner's risk in carriage of live stock.
§ 264. Construction of exception by English courts.
§ 265. Legislation in England.

CHAPTER XVIII.

EXCEPTIONS, CONTINUED.—PERILS OF THE SEA.

§ 266. "Perils of the sea."
§ 267. Perils of the sea—Definition.
§ 268. Perils of the sea—Inland navigation.
§ 269–270. What are perils of the sea.
§ 271. Custom affecting the interpretation of the clause.
§ 272, 273, 274. What are not perils of the sea.
§ 275. Perils of the sea and negligence causing loss.
§ 276. Perils of the sea must be shown to be necessary cause of loss.
§ 277. Effect of clause when goods are stowed on deck.
§ 278. Duty to protect the goods after damage by a peril of the sea.

CHAPTER XIX.

EXCEPTIONS, CONTINUED.—LOSS OF PERISHABLE GOODS — LOSS BY INHERENT DEFECT—BY DETERIORATION—BY DECAY.

§ 279. Carriers are not liable for loss which is the result of the "inherent nature of the goods" shipped.
§ 280. "Perishable goods."
§ 281, 282. "Inherent defect — Deterioration—Decay."
§ 283, 284. Exception does not relieve from negligence.
§ 285. Carrier's duty is measured by the circumstances of each case.
§ 286. Master's duty to open packages.
§ 287. Master's duty in regard to the sale of injured goods.
§ 288. Master should communicate with the owners.
§ 289. Right of a carrier by land to sell perishable goods.

CHAPTER XX.

EXCEPTIONS, CONTINUED.—PIRATES AND ROVERS—PUBLIC ENEMY—RATS AND VERMIN.

§ 290. Loss by "pirates," generally.
§ 291. What are losses by pirates.
§ 292, 293. Who are "public enemies."
§ 294. What are not losses by the public enemy.
§ 295. The exception does not relieve the carrier from the result of his negligence.
§ 296. The loss might be the proximate result of the negligence.
§ 297. Effect of declaration of war upon the carrier's obligation.
§ 298. Loss by "rats" is not a peril of the sea.
§ 299. Loss by "vermin" is not a peril of the sea.

CHAPTER XXI.

EXCEPTIONS, CONTINUED.— RESTRAINT BY LEGAL PROCEDURE — RESTRAINT OF PRINCES—OF PEOPLE.

§ 300 "Restraint by legal procedure," necessity for the exception.
§ 301. Obligations of the carrier when legal seizure is made.
§ 302. Opinion in the case of Stiles *v.* Davis.
§ 303. Conflicting decisions in Massachusetts.
§ 304. Definitions of exception "restraint of princes."
§ 305. Seizure for violation of custom laws within the exception.
§ 306, 307, 308. Embargo, blockade, and neutrality edicts generally within the exceptions.
§ 309. Effect of damage by delay caused by quarantine regulations.
§ 310. Restraint of princes and restraint of people practically synonymous terms.

CHAPTER XXII.

EXCEPTIONS, CONTINUED. — "RIOTS, STRIKES, AND STOPPAGES OF LABOR"—"RISK OF BOATS"—"AT SHIP'S RISK"—"ROBBERS AND THIEVES"—"RUST"—"SWEAT."

§ 311. "Riots, strikes, and stoppages of labor," generally.
§ 312. Exception not always necessary to be inserted in the bill.
§ 313. Delay caused by a strike.
§ 314, 315. Delay caused by an armed mob.
§ 316. Decisions of Federal Courts in regard to strikes.
§ 317. "Risk of boats."
§ 318. "At ship's risk."
§ 319, 320. "Robbers and thieves."
§ 321. "Rust."
§ 322. "Sweat."

CHAPTER XXIII.

BILLS OF LADING FOR THROUGH CARRIAGE.

§ 323. Carriers may contract to carry beyond their own line.
§ 324. Carriers other than the first, are agents of the latter.
§ 325. The first carrier continues liable to final destination.
§ 326. First carrier may, by contract, limit his liability to his own line, except for negligence.
§ 327. Contract to carry beyond the carrier's own line may be expressed or implied.
§ 328. The receipt of goods marked to be delivered beyond the receiving carrier's own line.
§ 329. Receipt of such goods by one of an association of carriers.
§ 330. General statement of the rule.
§ 331, 332. What have been held to be "through" contracts.
§ 333. Effect of contract to "forward."
§ 334. Duties of the carrier under such a bill.
§ 335. Forwarder must follow shipper's instructions.
§ 336. In the absence of instructions, carrier must forward by usual conveyance.
§ 337. Carrier contracting "to forward" is liable to the end of the route, unless otherwise stipulated.
§ 338. Carrier cannot escape his liability by calling himself a "forwarder only."
§ 339, 340. Liability may, by contract, be limited to carrier's own line.
§ 341. The rule in England.

CHAPTER XXIV.

LIABILITY OF INTERMEDIATE CARRIERS UNDER A "THROUGH" BILL OF LADING.

§ 342. An intermediate carrier must deliver to the next succeeding carrier.
§ 343. The carrier in possession of the goods when destroyed is liable to the shipper.
§ 344. Such a carrier may show in defence the misconduct of the preceding carrier.
§ 345. Effect of several carriers being associated for through transportation.

§ 346. To hold final carrier for injury to goods shipped delivery to first carrier in good condition must be shown.
§ 347. Goods shipped in good condition are presumed to remain so until delivery to the final carrier.
§ 348, 349. General limitation of liability in the bill by the first carrier enures to the benefit of the succeeding carriers.
§ 350. Succeeding carriers are not benefited by a contract made by the first carrier only for the latter's behalf.

CHAPTER XXV.

THE CLAUSE "PRIVILEGE OF RESHIPPING."

§ 351. Effect of the clause "privilege of resphipping."
§ 352. "Privilege of reshipping in case of low water."
§ 353. The privilege must be exercised in the customary way.
§ 354. Effect of the clause on the second carrier's lien for freight charges.

CHAPTER XXVI.

STIPULATIONS AS TO DEMURRAGE, ETC.

§ 355. Stipulation as to the payment of demurrage in the bill.
§ 356. Liability for demurrage where the bill contains no such clause.
§ 357. Provision in a charter-party as to demurrage.
§ 358. Construction of the phrases "charges" and "primage and average accustomed."

CHAPTER XXVII.

STIPULATIONS AS TO PAYMENT OF FREIGHT.

§ 359. Effect of stipulations in the bill as to lien for "freight."
§ 360. The clause "freight charges paid through" does not deprive last carrier of his lien.
§ 361. Lien for freight is lost if the goods are injured by the carrier's negligence.
§ 362. Goods of one shipper are not liable for charges on the goods of another, though shipped under the same bill.
§ 363. Freight—person to whom payable.
§ 364, 365, 366, 367, 368. Freight—person by whom payable.
§ 369. "He (the consignee) paying the freight," and similar clauses.
§ 370. "Delivery upon payment of freight."
§ 371. Refusal to give a bill unless freight be previously paid.
§ 372. Freight—amount due.
§ 373. Freight payable upon "net weight delivered."
§ 374. A promise to pay reasonable freight is implied by law.
§ 375. Right to set off damages against a claim for freight.

§ 376. Freight for goods delivered short of destination.
§ 377. Freight for goods underclassed by shipper.
§ 378, 379. Freight—when due.
§ 380, 381. Specific stipulations contained in the bill, judicially construed.

CHAPTER XXVIII.

STIPULATIONS RELATING TO DELIVERY—GOODS SHIPPED C. O. D.—CLAIM FOR LOSS WITHIN LIMITED TIME.

§ 382, 383, 384, 385. Carrier's duty under bill for goods shipped "C. O. D."
§ 386, 387, 388. Claim for loss to be made within a limited time.
§ 389. Effect of notice on the back of the carrier's receipt.
§ 390. Claim to be made before removal.
§ 391. Claim to be made at a particular office.
§ 392. Claim for non-delivery is not covered by "loss or damage."
§ 393. Claim to be made in thirty days held to be reasonable limitation.
§ 394. Consideration of the clause limiting time for claim in England.
§ 395, 396. Consideration of clauses of similar import.

CHAPTER XXIX.

THE BILL IN ITS RELATION TO THE DELIVERY OF GOODS TO THE CONSIGNEE.

§ 397. Surrender of the bill before delivery of the goods.
§ 398, 399. Effect of custom on the delivery of the goods.
§ 400, 401, 402, 403, 404, 405, 406. Wharf delivery by a vessel.
§ 407, 408, 409. Wrong delivery by a vessel.
§ 410. Delivery by a carrier on land.
§ 411. Place of delivery.
§ 412. Time of delivery.
§ 413. Acceptance by the consignee.
§ 414. The person to whom delivery is to be made.
§ 415. Effect of marks on the goods upon the stipulations in the bill.

CHAPTER XXX.

THE BILL OF LADING A MUNIMENT OF TITLE—A SYMBOL OF THE GOODS—A MEANS OF TRANSFERRING TITLE.

§ 416. A bill of lading is a muniment of title.
§ 417. Bill is a symbol or representative of the goods.
§ 418. Bill is evidence of an insurable interest in the cargo in prize courts in England.
§ 419. And in American prize courts.

§ 420. Delivery of the bill is a sufficient delivery of the goods within the Statute of Frauds.
§ 421. Bill of lading is a means of transferring title.
§ 422. Right of a vendee to demand a bill of lading.
§ 423. Vendee is not entitled to all existing copies of the bill of lading.
§ 424, 425. Duration of bill of lading's availability as a symbol.
§ 426. Duration where there is continuous carriage on several connecting lines.
§ 427. Holder of the bill of lading is not bound to give notice of his title.

CHAPTER XXXI.

BILLS OF LADING ISSUED BY CARRIERS WITHOUT RECEIVING THE GOODS.

§ 428, 429. Carrier is not liable on such an unauthorized issuance by his agent. Grant *v.* Norway.
§ 430. Effect of the English Bills of Lading Act.
§ 431. Issuance of second bill for goods received.
§ 432. American cases. The Schooner Freeman *v.* Buckingham.
§ 433. The rule applies to bills issued by shipping agents.
§ 434. The contrary rule prevails in some jurisdictions—New York, Kansas, Nebraska.
§ 435. Statutes providing that bills of lading shall be conclusive evidence of the receipt of the goods.
§ 436. The bill gives title to goods received subsequently to its issuance.
§ 437. The rule is not affected by statutes prohibiting the issuance of the bill without the receipt of the goods.

CHAPTER XXXII.

THE NEGOTIABILITY OF THE BILL OF LADING.

§ 438. The bill is not "negotiable" in the ordinary sense of that term.
§ 439, 440, 441, 442. The nature of the interest or title of which the bill is a muniment.
§ 443, 444, 445, 446, 447, 448, 449, 450, 451. Statutes relating to the negotiability of bills.
§ 452, 453, 454. The construction of statutes relating to the negotiability of the bill.
§ 455, 456, 457, 458, 459. Rights of holders of different parts of a bill issued in sets.

CHAPTER XXXIII.

THE BILL OF LADING IS A MUNIMENT OF NO TITLE AS AGAINST THE TRUE OWNER, WHEN THE PARTY ISSUING OR TRANSFERRING IT HAS NO TITLE OR AUTHORITY.

§ 460, 461, 462, 463. The general principle.
§ 464. The question considered as one of bailment. The carrier may be compelled to disregard his bailor's title and recognize that of the true owner.
§ 465, 466. Want of notice to the carrier by the true owner does not validate the bill-holder's title.
§ 467, 468. The manner in which the carrier's bailor obtained possession of the goods, whether fraudulently or in good faith is immaterial.
§ 469. Unauthorized delivery by an agent confers no title.
§ 470. Exception where apparent ownership is intended.

CHAPTER XXXIV.

THE BILL OF LADING AS A MUNIMENT OR AS EVIDENCE OF TITLE IN A CONSIGNEE.

§ 471, 472, 473, 474. The bill is *prima facie* evidence of the consignee's title.
§ 475. The consignee is the *prima facie* owner, though the carrier be paid by the consignor.
§ 476. The consignor's property is sufficient to enable him to maintain an action for a failure or refusal to deliver the goods.
§ 477. The consignee may sue without delivery of the bill, when the consignor releases his title.
§ 478. Or upon the re-indorsement of the bill.
§ 479, 480, 481. The consignment is not conclusive evidence of a title in the consignee.
§ 482, 483. Making goods deliverable to the vendor's order is *prima facie* evidence of instruction to reserve the *jus disponendi*.
§ 484. Making goods deliverable to the vendor's agent has the same effect.
§ 485, 486. The presumption is strengthened when the bill is pledged to secure a draft against the goods, but it is not conclusive.
§ 487, 488. Shipment in the vendee's vessel does not conclusively rebut presumption of the reserved control.
§ 489, 490. The reservation of the *jus disponendi* is a question of intention.
§ 491, 492. Where the consignee is the consignor's factor.

CHAPTER XXXV.

THE TRANSFER OF THE BILL.

§ 493. The bill is transferable by indorsement and delivery.
§ 494. Title may be passed by other modes of assignment.
§ 495. When the carrier need require no indorsement to warrant a delivery.
§ 496, 497. Title may be transferred by the delivery of the bill unindorsed.

§ 498, 499, 500. The same—English authorities.
§ 501. The same—German code.
§ 502, 503. The delivery must be with an intent to pass property in the goods. When the intention is a question for the jury.
§ 504, 505, 506, 507. Delivery of a bill containing no words of negotiability.
§ 508. The effect of a transfer varies with the instruction.

CHAPTER XXXVI.

THE BILL OF LADING AS COLLATERAL SECURITY.

§ 509, 510. Character of the pledgee's title.
§ 511. Pledgee has such property as will enable him to maintain replevin.
§ 512. Pledgee's title is paramount to the right of stoppage *in transitu*.
§ 513. No title passes unless the bill be delivered.
§ 514, 515. Forwarding a bill attached to a draft for the price of goods is not necessarily a delivery to the party discounting the draft.
§ 516, 517. Pledgee's rights are paramount to those of the consignee.
§ 518. Pledgee's rights are paramount to those of a consignee to whom the consignor is indebted beyond the value of the goods.
§ 519. Agreements between a consignor and a consignee that the shipment shall be appropriated to the payment of the former's debts are immaterial.
§ 520. Consignee's ignorance of the pledge is immaterial.
§ 521. Pledgee's title is conditional.
§ 522. The same—whether the transaction is a mortgage or a pledge is immaterial.
§ 523, 524. The pledgee's title defaulted by acceptance rather than payment of draft.
§ 525, 526. The rule holds where the draft has been sent to an agent for collection.
§ 527. The bill may be made security for the payment by express agreement.
§ 528. Consignee cannot claim possession until he accepts or pays the draft.
§ 529. Pledgee is liable in damages for refusal to deliver upon the consignee's acceptance or payment of the draft.
§ 530. Pledgee's right is not divested by the consignee's obtaining possession of the goods without acceptance or payment of the draft.
§ 531. Nor by the consignee's own delivery of the goods where in trust for redemption of pledge.

CHAPTER XXXVII.

THE BILL-HOLDER'S TITLE AND THE RIGHT OF STOPPAGE IN TRANSITU.

§ 532. The right is general.
§ 533. The right is defeated by a transfer of the bill of lading for value to a *bona fide* transferree.
§ 534. The bill-holder's title is not necessarily invalidated by the fraud of the original vendee.

§ 535. The bill must have been obtained in faith of an apparent title.
§ 536. Right of stoppage is not defeated where the transfer is fraudulent.
§ 537. Transferree's knowledge of the vendee's insolvency, or that the goods were not paid for.
§ 538. The consideration for the transfer—what bill-holders may defeat the right.
§ 539. The same. Antecedent debts.
§ 540, 541. The same. Contemporaneousness of the transfer.
§ 542. The same. Transfer as collateral for an antecedent debt.
§ 543. The same. Forbearance to sue, etc.
§ 544. The bill-holder has only such an interest as will protect his advances. Consignor's right to the surplus.
§545. The same. Sub-sales— sales of goods "to arrive," etc.
§ 546. The same. Additional securities of the vendee must be first appropriated to the pledgee's claim.
§ 547. The right of stoppage is not defeated unless the bill is transferred.
§ 548. Notice of stoppage to the carrier after the vendee's transfer of the bill.

CHAPTER XXXVIII.

THE UNIFORM BILL OF LADING—ITS GROWTH AND ADOPTION.

§ 549. The growth of the uniform bill.
§ 550, 551. The originators of the uniform bill.
§ 552. The benefits resulting from a uniform bill.
§ 553. Form of the uniform bill.

BILLS OF LADING.

CHAPTER I.

DEFINITION OF A BILL OF LADING—ITS KINDS, CONTENTS, PARTIES, AND OFFICES.

Definition of a bill of lading, § 1.
What are not bills of lading, § 2.
The several kinds of bills of lading, § 3.
Contents of the bill, § 4.
The original parties to the bill, § 5.
By whom bills may be given, § 6.
Who are common carriers, §§ 7–10.
Bills of lading contracts for diminished liability, § 11.
The consideration paid for transportation—freight, § 12.
The offices of the bill—a receipt, a contract, and a muniment of title, § 13.

§ 1. A BILL of lading is a written acknowledgment by a carrier of the receipt of certain goods and an agreement for a consideration to transport and to deliver the same at a specified place to a person therein named or to his order. It is, during the transportation, the representative of the goods, and by its assignment, or indorsement and delivery, title to the goods may be transferred.

The instrument has been judicially defined. Mr. Justice Clifford says, in "The Delaware,"[1] that a bill of lading is "A written acknowledgment signed by the master that he has received the goods therein described from the shipper, to be transported on the terms therein expressed to the described place of destination and there to be delivered to the consignee or parties therein designated."

In Cope *v.* Cordova,[2] Mr. Justice Rogers says that a bill of lading is "A formal acknowledgment of the receipt of goods and an engagement to deliver them to the consignee or his assigns."

Again, Mr. Justice Stockton in Merchant's, etc., Bank *v.*

[1] 14 Wallace, 579.

[2] 1 Rawle (Pa.), 202.

Hewitt,[1] says: "A bill of lading is the contract of the master of a vessel to deliver the property to the person to whom the consignor or shippers shall order the delivery."

The Indian Stamp Act 1, of 1879, § 3, cl. 3, thus defines a bill of lading: "Bill of lading means any instrument signed by the owner of a vessel or his agent, acknowledging the receipt of goods therein described and undertaking to deliver the same at a place and to a person therein mentioned or indicated."[2]

§ 2. From the definition it is clear that an account for freight, usually called a freight bill, is not a bill of lading;[3] nor is a way bill since it is altogether *ex parte* and is not a contract;[4] nor is a dray ticket;[5] nor is a paper, signed only by the consignor, stating the shipment and entrusted to the master of the vessel.[6]

§ 3. Bills of lading were originally of two kinds: those issued for the transportation of goods by water, and those issued for the transportation of goods by land. The former are termed "bills of lading" generally or "foreign bills," while to the latter the term "inland bills" is often applied. Since the development of transportation, however, a bill is now frequently issued to cover both water and rail carriage.

A "clean" bill of lading is one issued for the transportation of goods by water, which is silent as to the mode of stowing the goods. A "clean" bill imports that the goods are to be safely and properly stowed under deck.[7]

§ 4. The instrument ordinarily contains the name of the place and the date of the shipment; a description of the kind,

[1] 3 Iowa, 93.

[2] A "shipping note," as it is called, for goods shipped by rail, is a bill of lading within the meaning of the statute referring to bills of lading, as is plainly imported by the words "or train" in the statute. Royal Canadian Bank *v.* Grand Trunk Ry. Co., 23 U. C. C. P. Rep. 225.

"Connaissement" means "bill of lading." Stearine Co. *v.* Heintzmann, 11 L. T. N. S. 272; 17 C. B. N. S. 56; 10 Jur. N. S. 881.

[3] Coosa River Stm. Co. *v.* Barclay, 30 Ala. 120; Dows *v.* Rush, 28 Barb. (N. Y.) 157; Dows *v.* Greene, 24 N. Y. 638.

[4] Peixotti *v.* McLaughlin, 1 Strob. 468.

[5] Fleming *v.* Mills, 5 Mich. 420.

[6] Covill *v.* Hill *et al.*, 4 Denio (N. Y.), 323; Gage *v.* Jaqueth, 1 Lansing (N.Y.), 207; Wolf *v.* Meyers, 3 Sandford, 7.

[7] The Delaware, 14 Wallace, 579; Creery *v.* Holly, 14 Wend. (N. Y.) 26.

quantity, quality, and condition of the goods; the names of the shipper, transporter, and person to whom the goods are sent; the name of the place of destination and, generally, the terms upon which the transportation is to be made.

Accuracy in stating the place and date of shipment, the place of delivery, and the person to whom the goods are to be delivered, and the premium to be paid for transportation, is desirable in a bill of lading to prevent dispute and misunderstanding. For a similar reason a clear statement of the nature, value, quantity and quality of the goods shipped is necessary. So needful is this regarded that some of the States[1] have taken legislative action compelling the insertion of such a description of the goods.

§ 5. The original parties to the bill are three in number: the shipper or consignor, who presents the goods for transportation; the consignee or he to whom, or to whose order, the goods are to be delivered and the carrier or he to whom the goods are entrusted for transportation and delivery.

The bill must be signed by or on behalf of the party undertaking the carriage, but need not be, and generally is not, signed by the party shipping. The mere acceptance of the bill by the latter is in most States, evidence of an agreement to its terms.

§ 6. The bill of lading may be issued by an individual or a corporation, for transportation to be made without or with compensation. There is a fundamental difference between gratuitous carriers and carriers for hire as to the degree of their responsibility. The former are compelled only to exercise such care and diligence in regard to the goods transported as are bestowed by an ordinarily careful man in the management of his own business and property. The latter, known as common carriers are, as we shall see, subject to more serious obligations. It is upon bills issued by common carriers that the questions hereafter to be discussed have generally arisen.

§ 7. Common carriers are individuals or corporations who undertake for hire to transport from place to place the goods of all such persons as choose to employ them.

[1] Maine, Massachusetts, and other States. See Maine St. of 1821, C. 14 Rev. Sts. 1850, C. 35; Mass. St. 1818, C. 122; Gen. Sts. 1860, C. 52.

Thus, railroad companies are common carriers and are subject to all the liabilities of such carriers.[1] Railways which take a car for transportation over their road and assume the sole possession and care of it, although it remain on their own tracks, are responsible as common carriers.[2] A railroad company agreeing with a party to furnish motive power to draw his cars loaded with his coal over its road, he to furnish brakemen to be under the control of the company's conductor, and also to load and unload the cars assumed as to such cars, the liabilities of a common carrier.[3]

The charter of the Michigan Central R. R. Co., being in the nature of a contract with the State that the company shall become and remain a common carrier as at common law, its liability as such becomes irrevocably fixed and cannot be modified by any contract.[4]

§ 8. A private arrangement between a railroad company and an express company for the transportation of light freight will not relieve the former from liability as a common carrier for packages received on the cars from persons having no notice of the arrangement. It is immaterial whether the article was given at the cars to the agent of the express company, or to a baggage master or other agent of the railroad company.[5] Express companies, being engaged in transporting not only small packages and articles of value but also of merchandise and the great staples and products of the country, are common carriers and subject to their liabilities.[6]

[1] Southwestern Ry. *v.* Webb, 48 Ala. 585; M. & G. R. R. Co. *v.* Prewitt, 46 Ala. 63; I. C. R. R. Co. *v.* Frankenberg, 54 Ill. 88; Dibble *v.* Brown, 12 Ga. 217; Constitution State of Penna., Art. XVII., sect. 1; Selma & Meridian R. R. *v.* Butts, 43 Ala. 385.

[2] New Jersey R. R. Co. *v.* Penna. R. R. Co., 3 Dutcher, 100.

[3] Mallory *v.* Tioga R. R. Co., 39 Barb. 488.

[4] M. C. R. R. Co. *v.* Ward, 2 Mich. 538.

[5] Langworthy *v.* N. Y. & H. R. R. Co., 2 E. D. Smith (N. Y.), 195.

[6] Southern Ex. Co. *v.* Crook, 44 Ala. 468; Southern Ex. Co. *v.* Hess, 53 Ala. 19; Southern Ex. Co. *v.* Newby, 36 Ga. 635; Belger *v.* Dinsmore, 51 N. Y. 166; American Ex. Co. *v.* Haggard, 37 Ill. 465; Landsberg *v.* Dinsmore, 4 Daly (N. Y. C. P.), 490; Gulliver *v.* Adams Ex. Co., 38 Ill. 503; Southern Ex. Co. *v.* Thornton, 41 Miss. 216.

An express company whose business is—and is represented by them to the public to be—to receive, convey and deliver coin, bullion, commercial paper, bank bills and goods for such as choose to employ them for a compensation, are common carriers.[1] That they are not the owners of the conveyance they employ in the conduct of their business, does not affect the legal character of the business.[2] An express company making a contract for the transportation of goods from New York to Louisville, though the receipt say "to be forwarded," is a common carrier and not a mere forwarder, though it employs the conveyance of third parties only in the performance of its contract.[3]

A messenger employed by an express company is not, as between him and the company, a common carrier. The express company is the common carrier. The messenger is only liable to it under his contract with it as agent.[4]

§ 9. Transportation companies, receiving goods for transportation, are common carriers and as such are liable as insurers.[5] Draymen, cartmen and porters, who undertake to carry goods for hire as a common employment from one part of a town to another, come within the definition of a common carrier. So does the driver of a slide with an ox-team. The mode of transporting is immaterial.[6]

The owner of a wagon train, who sends his train to convey goods for any who may employ him and undertakes to carry the goods of a certain party without any special agreement, assumes the liability of a common carrier.[7] Where a planter, employing his wagons in hauling his cotton crop to market and habitually lading them on their return with goods to be transported for hire, receives such goods and executes his receipt therefor, undertaking to deliver them at the customary rate of

[1] Sherman *v.* Wells, 28 Barbour (N. Y.), 403.

[2] Russell *v.* Livingston, 19 Barbour, 346.

[3] Read *v.* Spaulding, 5 Bosw. 395 (Supr. Ct. N. Y.).

[4] Southern Ex. Co. *v.* Frink, 67 Ga. 201.

[5] M. D. T. Co. *v.* Kahn, 76 Ill. 520; C. & A. R. & Trans. Co. *v.* Burke, 13 Wend. (N. Y.) 611; Spears *v.* L. S. & M. S. R. R. Co., 67 Barbour (N. Y.), 513; Stephens & C. T. Co. *v.* Tuckerman, 4 Vroom (N. J.), 543.

[6] Robertson *v.* Kennedy, 2 Dana (Ky.), 430.

[7] Seligman *v.* Armijo, 1 New Mexico, 459.

charges, he will be responsible as a common carrier.[1] Steamship companies are common carriers,[2] as are also companies using steamboats and railroads to transport passengers and baggage.[3] The owners of steamboats engaged in the carrying trade on navigable rivers, are common carriers bound by the common law rule.[4] Ship owners, in a contract by a bill of lading for the transportation of merchandise, take upon themselves the responsibilities of common carriers.[5] Canal companies are common carriers.[6]

§ 10. One not in business as a common carrier, but owning a canal boat for his own use, applied to a common carrier, who knew these facts, and was employed by the latter to carry a load of freight. The former was held not to be liable as a common carrier, although his employer had contracted as a common carrier and he knew it. His liability was determined by the business in which he was engaged and the character of his own, not his employer's, employment.[7] Ferrymen are common carriers and liable as such.[8] Proprietors of stage wagons, coaches and omnibuses are common carriers.[9] One who, for hire, carries passengers and baggage alone for all who choose to employ him, to and from depots, hotels, etc., is a common carrier of goods and liable for all losses but the inevitable.[10] A city express company engaged in carrying parcels between the cities of New York and Brooklyn and to and from various railroad depots, is a common carrier.[11]

[1] Harrison *v.* Roy, 10 George (Miss.), 396.

[2] Fowler *v.* L. & G. W. Stm. Co., 23 Hun (N. Y.), 196.

[3] C. & A. R. & Trans. Co. *v.* Burke, 13 Wend. (N. Y.) 611.

[4] Gilmore *v.* Carman, 1 Sm. & M. (Miss.) 279; Gordon *v.* Buchanan, 5 Yerger (Tenn.), 71; Porterfield *v.* Humphreys, 8 Humphreys (Tenn.), 497; Allen *v.* Sewall, 2 Wend. (N. Y.) 327; Witbeck *v.* Schuyler, 44 Barb. (N. Y.) 469.

[5] The Delaware, 14 Wall. 579; Merrill *v.* Grinnell, 30 (N. Y.) 594.

[6] Constitution of the State of Penna., Art. XVII., sec. 1.

[7] Fish *v.* Clark, 49 N. Y. 122.

[8] Harvey *v.* Rose, 26 Ark. 3; Sanders *v.* Young, 1 Head (Tenn.), 219; Hall *v.* Renfro, 3 Metc. (Ky.) 51; Powell *v.* Mills, 8 George (Miss.), 691.

[9] Story on Bailments, 496 and cases cited; Dibble *v.* Brown, 12 Ga. 217; Hollister *v.* Nowlen, 19 Wend. (N. Y.) 234; Phillco *v.* Sanford, 17 Texas, 227; but see Powell *v.* Mills, 1 George (Miss.), 231; Miss. C. R. R. Co. *v.* Kennedy, 41 Miss. 671.

[10] Parmelee *v.* Lowitz, 74 Ill. 116.

[11] Richards *v.* Westcott, 2 Bosw. (N. Y. Supr. Ct.) 589.

§ 11. As they are exercising a public employment, carriers are held to a high degree of care in the conduct of their business. To diminish the heavy responsibility which the law thus imposes upon him, the carrier resorted to the expedient of making a special contract with each shipper for the transportation of his particular goods. By such contract it was agreed that the carrier should not be liable for loss arising from certain specified causes. This contract was the foundation of the bill of lading. It will thus be seen that the bill is not a contract for safe transportation,[1] for this was the obligation at common law, nor does the bill create the contract between the shipper and the carrier. It was adopted only as a convenient mode of reducing the contract to certainty in regard to the specific terms.[2] The bill will, therefore, be found to contain an enumeration of causes of loss or injury to the goods for which it is specifically agreed by the parties that the carrier shall not be held accountable. The consideration for this release from liability is the reduced price for which the carrier agrees to make the transportation.

§ 12. The premium to which the carrier is entitled for transporting the goods and in consideration of the payment of which he agrees to transport, is known as "freight," a term used as well to designate the goods themselves. Mr. Justice Wayne in the case of Brittan *v.* Barnaby, says: "The word freight, when not used in a sense to imply the burden or loading of the ship or the cargo which she has on board, is the hire agreed upon between the owner or master for the carriage of goods from one part or place to another."[3]

Freight may, by the terms of the bill, be made payable by the shipper at the time of shipment, or, by the consignee on the delivery to him upon the completion of the carriage,—the possession of the goods by the carrier and his right to retain them until payment affording him security against loss.

§ 13. From the definition of a bill of lading, it will be seen that the instrument possesses three distinct characters. First,

[1] Drew *v.* Red Line Trans. Co., 3 Mo. App. Rep. 495.

[2] Dunn *v.* Branner, 13 La. Ann. Rep. 453.

[3] 21 Howard, 527.

"it is a written acknowledgment of the receipt of goods" or, more briefly, a Receipt. Second, it is "an agreement for a consideration to transport and deliver the same." It is, therefore, a Contract.[1] Again, the instrument may be assigned and title to the goods may be thereby transferred. It becomes thus a "Muniment of Title." It has, in some States, been declared a negotiable instrument.

The further investigation of the law relating to the paper may, therefore, conveniently be pursued, by viewing the bill, first, as a Receipt, second, as a Contract, and third, as a Muniment of Title.

[1] The Delaware, 14 Wallace, 601; Cafiero *v.* Welsh, 8 Phila. 130.

CHAPTER II.

A BILL OF LADING IS A RECEIPT AND ITS TERMS MAY BE VARIED BY PAROL PROOF AS BETWEEN THE ORIGINAL PARTIES, AS TO THE DESCRIPTION OF THE GOODS AND AS TO THEIR WEIGHT AND QUANTITY.

The bill is a receipt and its recitals may be varied by parol proof as between the original parties, § 14.
The bill is not conclusive evidence of delivery to the carrier, § 15.
Illustrations of the principle, § 16.
The bill is *prima facie* evidence of such delivery, § 17.
Effect of a bill executed before reception of the goods, § 18.
Effect of a bill receipting for goods improperly described, § 19.
Misdescription by shipper inducing less degree of care, § 20.
Instances of misdescription, § 21.
Further instances, § 22.
Misdescription to secure lower rate of freight, § 23.
Misdescription by the carrier, § 24.
Statement of weight and quantity only *prima facie* evidence of amount, § 25.
Carrier not bound by the statement of quantity, § 26.
Illustrations of the principle, § 27.
Contrary doctrine in Georgia, § 28.
Neither shipper nor consignee bound by the statement of quantity, § 29.
Effect of the statement of quantity on the burden of proof, § 30.
"Quantity guaranteed" and similar provisions, § 31.
Effect of the qualification "more or less," § 32.

§ 14. The ordinary bill of lading, whether for transportation by land or water, contains an acknowledgment of the receipt by the carrier of certain goods; a statement of their quantity, weight, quality, or value and a statement of their condition at the time of shipment. That part of the bill which relates to these matters may be treated as a receipt and as distinct from those parts which contain the terms of the contract for carriage.[1] The receipt, as between the original parties to the bill, is *prima facie* evidence of the truth of the statements contained in it.

[1] Myer *v.* Peck, 1 Tiffany (28 N. Y.), 590; Higgins *v.* U. S. M. S. S. Co., 3 Blatchf. (U. S. C. C.) 282.

Its recitals as between the original parties, that is, as between the shipper, the carrier and the consignee, are, however, susceptible, in certain cases, of explanation, modification or contradiction by parol proof.[1]

§ 15. The acknowledgment in the bill that goods have been received for transportation, is not conclusive of the fact that they have been so received.[2] It is competent for the carrier to show that the shipper had no such goods as those receipted for, or that, having such goods, they were never delivered to him.[3]

§ 16. An illustration may be found in the case of "The Lady Franklin." Here a bill of lading was given by a person who was agent for several vessels. The vessels had separate owners who were not connected by any joint undertaking to be responsible for each other's breaches of contract. The bill, through the mistake of the agent, acknowledged that certain goods had been shipped on one vessel, when in fact they had been previously shipped on another. The goods were lost by the vessel upon which they were shipped. A libel was filed by the shippers (who were the owners of the goods), against the vessel by which their bill recited the goods to have been received. It was held that she could not be made liable for the loss,—the bill as between the original parties being open to

[1] Cox *v.* Peterson, 30 Ala. 608; Wayland *v.* Mosely, 5 Ib. 430; Myer *v.* Peck, 1 Tiffany (28 N. Y.), 590; O'Brien *v.* Gilchrist, 34 Me. 554; Cafiero *v.* Welsh, 8 Phila. Rep. 130; Stm. Wisconsin *v.* Young, 3 Green (Iowa), 268; The Lady Franklin, 8 Wallace, 325; Glass *v.* Goldsmith, 22 Wisc. 488; Bissell *v.* Price, 16 Ill. 408; Wood *v.* Perry, 1 Wright (Ohio), 240; Witzler *v.* Collins, 70 Me. 290; Kirkman *v.* Bowman, 8 Robinson (La.), 246; White *v.* Van Kirk, 25 Barbour (N. Y.), 16; Lee *v.* Salter, Hill & Denio Supplt. (N. Y.), 163; Bradstreet *v.* Heron, 2 Blatchf. 116; The J. W. Brown, 1 Bissell (C. C.), 76; Fitzhugh *v.* Wyman, 9 N. Y. 559; Fowler *v.* Stirling, 3 L. C. Jurist, 103 (Sup. Ct.); *contra*, Pecks *v.* Dinsmore, 4 Porter (Ala.), 212.

[2] Goodrich *v.* Norris, 1 Abbott's Admiralty Cases, 196; Greenleaf on Ev., vol. 1, § 305.

[3] Berkeley *v.* Watling, 7 Adolph. & Ellis, 29; The Schr. Freeman *v.* Buckingham, 18 How. 182; Grant *v.* Norway, 10 C. B. 665; Meyer *v.* Dresser, 16 C. B. N. S. 657; The Delaware, 14 Wallace, 602; Hubbersty *v.* Ward, 8 Ex. 330; Sears *v.* Wingate, 3 Allen, 103; Baltimore, etc., R. R. Co. *v.* Wilkens, 44 Md. 11; Fearn *v.* Richardson, 12 La. Ann. Rep. 752; Fragano *v.* Long, 4 B. & C. 219; Hunt *v.* M. C. R. R. Co., 29 La. Ann. Rep. 446.

explanation, and it having been shown that the vessel had in fact never received the goods for which the receipt had been given.[1]

A somewhat similar case was Crenshawe *v.* Pearce, where an admiralty suit was brought upon three bills of lading reciting the shipment of 848 bales of cotton on board "The Arizona" from New York for Liverpool. Only 289 bales were sent by "The Arizona," the rest being carried by "The Wisconsin," which sailed a week later. Between the time of the arrival of the two ships at Liverpool, the price of cotton fell. Both ships belonged to the same line, but to different owners. The agent of the line made the contracts for carriage upon a steamship of the line "expected sailing 6th and (or) 13th September, agent's option," etc. The order issued for the receipt of the cotton by the line, specified the steamship "Arizona and (or) Wisconsin, about 800 bales of cotton." By mistake without the knowledge or authority of the agent and partly by the carelessness of the libellant, the bills of lading recited the shipment of 848 bales by "The Arizona." The court held that the libel should be dismissed.[2]

In the recent case of Smith *v.* Tregarthen, the defendant, the master of a steamer, signed bills of lading for four hundred bales of cotton for Liverpool. In consequence of insufficient room, only one hundred and sixty-five bales could be shipped and the defendant directed the remaining bales to be shipped by another steamer which arrived at Liverpool three days later than the former. Within these three days a fall in the price of cotton took place and the plaintiffs sued the defendant for the loss occasioned thereby. The court held that the plaintiffs could recover and that the measure of damages was the fall in value at Liverpool of the goods, between the day on which they ought to have been delivered and that on which the plaintiff in fact received them.[3]

§ 17. Though not conclusive, the bill of lading is nevertheless *prima facie* evidence of the actual delivery of goods to the

[1] The Lady Franklin, 8 Wallace, 325.

[2] Crenshawe *v.* Pearce, 37 Fed. Rep. 432.

[3] Smith *v.* Tregarthen, 56 L. J. Q. B. 437.

carrier.[1] It distinctly acknowledges that goods have been "shipped," or have been "delivered to" or "received by" him. Even where the bill contains no such acknowledgment by the carrier in the form of a receipt, his promise in the bill to convey and deliver certain goods implies their receipt by him.[2]

A carrier was sued upon a receipt in this form: "We have received from —— Walker 3 hhds. of tobacco, which we will freight to him to New Orleans, and, if they bear inspection, pay him the price they may sell for on our return." He was held liable for a lost hogshead, as if sold at New Orleans, though it never had been put on his boat.[3] Again, a transportation company, guilty of negligence in signing a receipt without ascertaining by actual observation whether certain flour receipted for had arrived at its warehouse and simply relying upon the statement of a clerk of a connecting railroad that it had been delivered there, was held liable to the owner of the flour for its non-delivery.[4]

A bill executed eighteen days after the goods were received by the carrier acknowledging the goods to have been shipped, has been held admissible as evidence of their delivery to him in a case free from suspicion of fraud, where a fair reason could be assigned for the failure to execute the bill at the time the goods were received.[5] The bill is not objectionable as evidence because it acknowledges the receipt of other goods besides those forming the subject-matter of the suit.[6]

§ 18. The very nature of a bill of lading shows that it should not be signed until the goods are actually in the hands of the carrier, since, as has been seen, it describes the goods as "shipped" or "received."[7] If, however, a bill of lading, through inadvertence or otherwise, is signed before the goods are actually shipped and afterwards certain goods are delivered to the carrier

[1] Flower *v.* Douns, 12 Robinson (La.), 101; Southern Ex. Co. *v.* Hess, 53 Ala. 19; Lishman *v.* Christie, L. R., 19 Q. B. D. 333.

[2] Southern Ex. Co. *v.* Craft, 49 Miss. 480.

[3] Jones *v.* Walker, 5 Yerger (Tenn.), 427.

[4] Northern Trans. Co. *v.* McClary, 66 Ill. 233.

[5] Graham *v.* Penna. Ins. Co., 2 Washington C. C. 113.

[6] Wallace *v.* Vigus, 4 Blackford (Ind.), 260.

[7] Hunt *et al. v.* Mississippi, etc., R. R. Co., 29 La. Ann. Rep. 446.

as and for the goods thus receipted for, the bill will operate on these goods, as between the shipper and carrier, by way of relation and estoppel and the rights and obligations of all concerned will be thereafter the same as if the goods had been actually delivered at the time of the signing of the bill.[1]

In the case of The Idaho[2] it was held that although the statutes of the State of Louisiana prohibited the issue of bills before the actual receipt of the goods, there was nothing in them forbidding the curing of an illegal bill by supplying goods, the receipt of which had been previously acknowledged.

A bill of lading, however, signed by the master of the vessel after the goods have been received by the carrier and lost, cannot create a liability. The rights of the parties have been previously fixed and the bill is wholly inoperative.[3]

§ 19. While a common carrier is bound to deliver the specific goods entrusted to him,[4] yet where goods are receipted for in the bill and are improperly described or are wrongly stated to be of a particular kind or quality, these statements, as between the original parties, are open to explanation or contradiction by extrinsic evidence.

§ 20. A misdescription of the goods covered by the bill may be due to the act of the shipper or to that of the carrier. The shipper may injuriously affect the rights of the carrier by describing the goods to be of a kind or quality different from their true one, thus inducing the carrier to relax his vigilance and to exercise a less degree of care in the transportation. This may result in injury to or loss of the goods. In such a case the consequences must fall upon the party who has misdescribed the goods even though he has done so innocently.[5]

If there be fraud on the part of the shipper in representing the nature of the goods, the carrier is exempted from liability,[6] except for that amount of care which should have been given

[1] Rowley *v.* Bigelow, 12 Pickering, 307; The Delaware, 14 Wallace, 602.

[2] The Idaho, 3 Otto, 575.

[3] The Bark Edwin, 1 Sprague, Dec. (D. C. Mass.) 477.

[4] Cafiero *v.* Welsh, 8 Phila. Rep. 130.

[5] Fassett *v.* Ruark, 3 La. Ann. Rep. 694.

[6] Cale *v.* Goodwin, 19 Wend. (N. Y.) 251.

to goods such as the article shipped is alleged to be.[1] The representations must however be such as to deceive the carrier. If they are obviously incorrect his liability still remains and he cannot relieve himself from it by setting up misrepresentations, unless they respect matters which are latent in their character.[2] A person omitting without fraud to state fully the contents of a package may be precluded from recovering the value of articles omitted, but his right to recover for the articles enumerated is not affected.[3]

§ 21. Bank bills are not properly included in the phrase "goods, freight, etc.," when used in connection with transportation. It was so held in a case where the bills were shipped in a valise which was packed in a large box with a number of articles of no special value and the carrier was not informed that there was money in the box.[4] Where a package containing "a wreath" was shipped and the wreath was partly made of glass and the glass was found to be broken on the arrival at destination, it was held that the carrier was not liable, as he was not properly informed of the fragile character of the property by its description.[5]

Again, a shipper delivered property for transportation as a bundle of bedding and upon a loss claimed that it contained valuable clothing, etc. It was here held that the failure to disclose the real contents of the bundle released the carrier from all liability except as to what might properly be termed "bedding."[6] It was claimed by a carrier company that the shipper of a valuable cow should have described her to the agent as being with calf as she was thus rendered more liable to injury. It was held that the failure to give such information did not release the carrier from liability for negligence causing injury to the animal.[7]

[1] Chicago, etc., R. R. Co. *v.* Shea, 66 Ill. 471; McCune *v.* B. C. R. & N. R. R. Co., 52 Iowa 600.

[2] N. J. R. R. & Trans. Co. *v.* Penna. R. R. Co., 3 Dutcher (N. J.), 100.

[3] Southern Ex. Co. *v.* Womrack, 1 Heiskell (Tenn.), 256.

[4] Chicago & Aurora R. R. Co. *v.* Thompson, 19 Ill. 578.

[5] American Express Co. *v.* Perkins, 42 Ill. 458.

[6] Chicago, etc., R. R. Co. *v.* Shea, 66 Ill. 471; Savannah, etc., R. R. Co. *v.* Collins, 3 Southeast. Rep. 416.

[7] McCune *v.* B. C. R. & N. R. Co., 52 Iowa 600.

§ 22. The word "package" as used in bills of lading is defined by the Supreme Court of Alabama to be a small parcel or bundle whose appearance gives no adequate information of its contents. A hogshead of tobacco or a bale of cotton,[1] or corn in bulk[2] would therefore all be improperly described by the term "package." Pistols are considered freight. The fact that articles of greater value were packed in the same box with them does not change their character and will not relieve the carrier from liability for their loss if these more valuable goods be not lost.[3]

§ 23. The second way in which a misdescription by the shipper may injuriously affect the carrier is by leading him to carry for a less compensation than that to which he would properly be entitled. Thus where goods really "double first class" were shipped as "first class" with a view of escaping payment of the proper rate of freight, the carrier was held entitled to charge the "double first class" rate on discovering the intentional misdescription of the goods by the shipper.[4]

Certain goods were described by the shipper in the bill as "hardware." During the transit the goods were discovered to be "sewing machines" for the carriage of which a higher rate of freight was due. It was held that when the true character of the goods was discovered the railroad agent had the right to bill them truly and charge the increased freight.[5]

§ 24. A misdescription of the goods by the carrier is not binding on the shipper, and the carrier cannot in such a case shield himself behind the strict letter of the recital in his bill where he receipts generally but with a knowledge of the contents. In the well-known case of Harmon *v.* The New York and Erie Railroad Company[6] the facts were that the agent of the carrier company signed a receipt for a lot of furniture and among the different articles specified was "one cradle" which had carpet wrapped around it, was bound with cords and con-

[1] Southern Ex. Co. *v.* Crook, 44 Ala. 468.

[2] McCoy *v.* Erie, etc., R. R. Co., 42 Md. 499.

[3] Hyde *et al. v.* New York, etc., S. S. Co., 17 La. Ann. Rep. 29.

[4] Rice *v.* I. & St. L. R. R. Co., 3 Mo. App. 27.

[5] Summer *v.* Southern R. R. Association, 7 Baxter (Tenn.), 345.

[6] 28 Barbour, 323 or 65 N. Y. 111.

tained a valise with wearing apparel in it. The agent was informed, when the shipment was made, of what the cradle contained. The court held in a suit for damages for the loss of the contents that the company was bound to carry not only the "cradle" but also the goods then in it.

In another case, marble in slabs sawed from blocks was receipted for as "unwrought marble, in boxes." Evidence was introduced on the one hand to prove that such marble was classed by several railroads and dealers generally as "unwrought." On the other hand proof was offered to show that there was no uniform rule on this subject and that the agent who made the classification for the carrying railroad company in this case intended to class such marble as "wrought;" that his predecessors had done so and that the receipt for this marble was by mistake and contrary to the rules of the company. It was here held that the jury were properly charged that the terms "wrought" and "unwrought," as applied to the marble in question, are of doubtful signification and that it was competent for the plaintiff to show what meaning is given to them by custom and usage and if the jury believed that the generally prevailing usage among manufacturers, dealers, and carriers, is to class and consider marble in slabs as "unwrought," then the defendant can claim freight upon it only as of that class.[1]

§ 25. Where the bill of lading receipts for a specific quantity or a specific weight of goods, it is *prima facie* evidence that the carrier received the quantity or weight named.[2] Such an acknowledgment is not, however, conclusively binding[3] as between the original parties, namely, as between the shipper and carrier, or as between the carrier and a consignee who has made no advances on the faith of the bill and who therefore stands on the same footing as the shipper.[4]

[1] Bancroft *v.* Peters, 4 Mich. 619.

[2] McLean *v.* Fleming, 25 L. T. N. S. 317; 2 L. R. H. L. Sc. App., 128; Hall *v.* G. T. R. Co., 34 Up. Can. 2 B. 517; Shatzell *v.* Hart, 2 Marshall (Ky.), 191.

[3] Steamboat Wisconsin *v.* Young, 3 Green (Iowa), 268; Meyer *v.* Peck, 28 N. Y. 590; Abbe *v.* Eaton, 51 N. Y. 411; Kirkman *v.* Bowman, 8 Robinson (La.), 246; Erb *v.* Keokuk Packet Co., 43 Mo. 53; The J. B. Brown, 1 Bissell, 76; Goodrich *v.* Norris, Abbotts Adm. 196.

[4] Berkeley *v.* Watling, 7 Adolp. & Ellis, 29; Sutton *v.* Kettell, 1 Sprague,

§ 26. Notwithstanding his receipt for a specific quantity or weight of goods, the carrier may show that he, in fact, received a less quantity or weight. If he prove that he has delivered, or is willing to deliver, all that he received for transportation, he cannot be held liable for the difference between the actual amount and that for which he improperly gave his receipt.[1] Especially does the rule apply to a case where the bill is signed for an amount in excess of the true one, by reason of the fraud of the shipper or of his agent.[2]

§ 27. The master of a ship in England, notwithstanding the bills of lading Act, may show that the cargo actually received by him differs in weight from that signed for in the bill of lading, at all events where the weight mentioned in the bill is mere matter of measurement.[3] An action was brought by the owners of a vessel against the owner of a cargo of wheat for freight withheld because of a difference between the number of bushels of wheat expressed in the bill of lading and that delivered to the consignee. The grain was delivered to the carrier from a warehouse and the defendant gave up the warehouse receipts on receiving the plaintiffs' bill of lading. The bill being open to explanation between the original parties, it was held that the fact that the shipper surrendered his warehouse receipts for the full amount named in the bill does not preclude the carrier from showing the mistake in regard to the quantity of wheat receipted for by him.[4]

Coal was shipped for the port of B., consigned to a railroad company having its terminus there, and to be transported by the latter to W. The bill of lading stated the number of tons and the freight per ton. The railroad company paid the freight to the master of the vessel and transported all the coal received,

309; Blanchard *v.* Page, 8 Gray, 287; The Lady Franklin, 8 Wall. 325; Hall *v.* Mayo, 7 Allen (89 Mass.), 454; Ryder *v.* Hall, ib. 456.

[1] L. R. & Ft. S. R. R. Co. *v.* Hall, 32 Arkansas, 669; Kirkman *v.* Bowman, 8 Robinson (La.), 246; Hall *v.* Mayo, 7 Allen (89 Mass.), 454; Dean *v.* King, 22 Ohio State, 119; Manchester *v.* Milne, 1 Abbott Bros., 115; Strong *v.* Grand Trunk R. R. Co., 15 Mich. 206.

[2] Bates *v.* Todd, 1 Moody & Robinson, 106 (Eng. N. P.).

[3] Blanchet *v.* Powell's Colliery Co., 9 L. R. Exch. 74; 43 L. J. Exch. 50; 22 W. R. 490; 30 L. T. N. S. 28.

[4] Glass *v.* Goldsmith, 22 Wisconsin, 488.

to W. On being weighed there after delivery, it was found to fall short several tons from the amount stated in the bill. It was the custom of the railroad company, known to the parties for whom the coal was transported, not to weigh the coal thus delivered but to depend on the bill of lading, but in the present case the agents of the railroad company could, with ordinary care, have observed a deficiency. It was here held in an action for freight by the railroad company, that it was not liable for the deficiency in the number of tons of coal, nor to a deduction from its charges of any of the freight paid the master.[1]

§ 28. A contrary doctrine would seem to obtain in the state of Georgia. A railroad company was sued for the loss of certain potatoes. The car was loaded by the plaintiff. A receipt was given on the plaintiff's measure for 9600 lbs. and freight accordingly charged by weight. On arrival, it was found that they had fallen off in weight. Here it was held that, the company's agent having receipted for the potatoes by weight and having taken freight for 9600 lbs., the company was bound thereby.[2]

§ 29. As the carrier is not estopped by his receipt for a specific quantity from showing a different amount, so is the shipper or consignee not to be prejudiced by the statement of quantity.

A carrier undertook, by bill of lading, to carry a carload of oats stated therein to weigh 20,000 lbs. Finding afterwards that there were really 23,667 lbs., the excess was taken out and the rest forwarded to consignees, who had, in fact, paid for and owned the whole quantity. It was held that even if the shipper did wrongfully inform the company as to the weight of the oats, it could not affect the consignee's title nor justify the carrier in converting the oats to his own use, even if the consignees knew that they were underbilled and intended to take them without paying freight on the excess unless it was demanded.[3]

[1] Naugatuck R. R. Co. *v.* Beardsley Scythe Co., 33 Conn. 218.

[2] Central R. R. and Banking Co. *v.* Anderson, 58 Georgia, 393.

[3] Wiggin *v.* B. & A. R. R. Co., 120 Mass. 201.

§ 30. The statement of quantity or weight is, as we have seen, *prima facie* evidence that the quantities named in the bill were received by the carrier. The *onus* of rebutting this presumption and of showing that a less quantity was actually received rests upon the carrier. If this be satisfactorily shown, the carrier is relieved from liability for the apparent deficiency,[1] but where the consignee has received goods at a wharf without qualification or reservation of the right to inspect, weigh, or measure them and the carrier proves due care of them during the transit and an actual delivery of all in his possession on his arrival, the burden of proof is on the consignee to establish that a deficiency in the weight specified in the bill, afterwards discovered, is chargeable to the wrongful act or neglect of the carrier.[2]

§ 31. A custom to treat the statement of quantity as conclusive upon the carrier has been held to be unreasonable and void,[3] but the statement may be made conclusive by the use of the words "quantity guaranteed."[4] If the language of the bill of lading should be deemed insufficient to determine the meaning of the words "quantity guaranteed," it may be regarded as a technical expression to be explained by the testimony of persons in the business knowing and understanding it.[5]

To preclude the carrier from showing a mistake in quantity, the language of the bill of lading must be clear and explicit to that effect. A bill of lading contained the clause, "All damages caused by boat or carrier, or deficiency of cargo from quantity as herein specified, to be paid by the carrier and deducted from the freight, and any excess on the cargo to be paid to the carrier by the consignee." The quantity delivered was some seventy bushels short of the quantity specified in the bill of lading. It was held that this bill of lading was neither a guaranty of the quantity specified, nor an agreement that the bill of lading should furnish the only evidence of the quantity. No damages could have been sustained in case the carrier

[1] McLean *v.* Fleming, 25 L. T. N. S. 317; 2 L. R. H. L., S. C. app. 128.

[2] M'Cready *v.* Homes, VI. American Law Reg. 229, Dist. Ct. U. S. for S. Carolina.

[3] Strong *v.* G. T. R. R., Co., 15 Mich. 206.

[4] Bissell *v.* Campbell, 54 N. Y. 353.

[5] Ib.

delivered all he received and by such a delivery his liability was discharged.[1]

A bill of lading contained the stipulation, "Any damage or deficiency in quantity the consignee will deduct from the balance of freight due the carrier." This was neither a guaranty that the carrier had received the whole quantity of goods specified nor an agreement to pay for a deficiency. The words "deficiency in quantity" were held to relate to the property actually shipped and not to the amount named in the bill.[2]

In the case of Murton *v.* Kingston and Montreal Forwarding Company[3] the bill provided, "All the deficiency in cargo to be paid for by the carrier and deducted from the freight and any excess in the cargo to be paid for to the carrier by the consignee." The quantity named in the bill was less than that actually shipped. The carrier claimed the excess, but was held not to be entitled to it as the provision in the bill did not have the effect of giving it to him, nor did any custom entitle him to it.

Where a written contract was made for the purchase of the cargo of a ship as it stood, consisting of about 1300 quarters of Indian corn, "the quantity to be taken from the bill of lading," etc., and the quantity turned out to be somewhat less than 1300 quarters, the proper construction was held to be that the parties had agreed to buy and sell the cargo at a price to be calculated from the quantity stated in the bill of lading and not to depend upon the actual quantity. The purchaser took the chance of the actual quantity turning out more, or the risk of its turning out less than the quantity stated and so he could not recover for short delivery.[4]

§ 32. In order to preclude any possible misconstruction of the liability which the carrier intends to assume for the statement of quantity or weight contained in his bill, the qualification "more or less" is sometimes added. The use of these words indicates that the carrier does not intend to be bound by the statement of quantity or weight, and that it is to be regarded as an estimate rather than an exact measurement. A bill reciting a shipment of a specified quantity "more or less" is

[1] Abbe *v.* Eaton, 51 N. Y. 411.
[2] Meyer *v.* Peck, 28 N. Y. 590.
[3] 18 Can. Law Jour. 278.
[4] Covas *v.* Bingham, 2 C. L. R. 212; 2 El. and Bl. 836; 18 Jur. 596; 23 L. J. Q. B. 26.

complied with by delivering a less quantity if no more was shipped.[1]

A consignor shipped 22,631 bushels of rye by a common carrier and received a bill of lading for "20,000 pounds more or less." The way-bill received by a subsequent carrier was simply for 20,000 pounds. This carrier sold the portion of the rye in excess of 20,000, claiming the right to do so because it was not in the way-bill. It was here held to be a question for the jury whether the plaintiffs (the consignees) did own all the rye in the car and whether the defendant had converted to its own use the portion sold by it. If the consignor had fraudulently understated the quantity so as to get the rye carried for less freight, then the carrier would not be bound to deliver more than the quantity called for.[2]

A receipt given by a carrier for a specific quantity contained a notice, printed at the top of it, "rates and weights entered in receipts or shipping bills will not be acknowledged." The carrier was not estopped by the statement of quantity contained in the bill from showing that a less amount was actually received by him and he was not liable for the apparent deficiency.[3]

[1] Kelley *v.* Bowker, 11 Gray 428; O'Brien *v.* Gilchrist, 34 Me. 554; Shepherd *v.* Naylor, 5 Gray 591; Dean *v.* King, 22 Ohio St. 119; Winterport G. & B. Co. *v.* Schr. Jasper, 1 Holmes 99.

[2] Peebles *v.* B. & A. R. R. Co., 112 Mass. 98.

[3] Horseman *v.* G. T. R. R. Co., 31 U. C. Q. B. 535.

CHAPTER III.

A BILL OF LADING IS A RECEIPT, CONTINUED.—EFFECT OF THE STATEMENT OF VALUE, OF THE CLAUSE "SAID TO CONTAIN," OF STATEMENT OF THE CONDITION AT TIME OF SHIPMENT.

Effect of the statement of value of the goods, § 33.
Effect of knowledge by the carrier of the true value, § 34.
Shipper not bound to state value unless asked, § 35.
Legislation requiring the shipper to state value, § 36.
Shipper, if asked, must state value truly, § 37.
Shipper must not deceive the carrier as to value by the manner of shipping, § 38.
Illustrations of the principle, § 39.
Further illustrations, § 40.
The question of fraud may be for the Court or for the jury, § 41.
Effect of the qualification "said to contain," § 42.
Effect of the statement "received in good order and condition," generally, § 43.
Statement refers to external or apparent condition, §§ 44, 45.
The reason for the rule, § 46.
The statement of condition is not conclusive, § 47.
Illustrations of the principle, § 48.
The statement is *prima facie* evidence of the condition and puts *onus* on the carrier to disprove, § 49.
A promise to deliver in good condition implies receipt in same, § 50.
Effect of the phrase "apparent good condition," §§ 51, 52.

§ 33. THE statement of value contained in the bill has a somewhat different effect from the other recitals in that which we have called the receipt. It becomes part of the contract of carriage rather than a mere receipt. It is, no doubt, in the absence of other proof, *prima facie* evidence that the goods receipted for were of the value stated, but further than this it often becomes conclusive even as between the original contracting parties. "As a general rule the valuation of cargo in the bill of lading, without fraud, is conclusive between the owner of the cargo and the owner of the ship in the adjustment of general average at the home-port."[1]

[1] Putnam, J., in Tudor *v.* Macomber, 14 Pickering (31 Mass.), 34.

NOTE.—A carrier was alleged to have received at Liverpool a box of

The statement of value is seldom found to be in excess of the true value when the goods have been injured or destroyed. The effort of the shipper is to secure the lowest rate for transportation even at an increase of risk to his goods. He, therefore, ordinarily places a low estimate upon them when tendering them for shipment.

§ 34. If the valuation set upon the goods by the shipper be known to the carrier to be less than the true one and the parties agree that the goods, in consideration of the diminished valuation, shall be carried at a lower rate, the statement of value is conclusive upon the parties.[1] Where, however, the carrier, knowing the value of the goods, fails to enter it in his receipt, he cannot rely upon a stipulation contained therein limiting his liability to a specific amount, in reality less than the true value of the goods, because the value has not been declared by the shipper.[2] Where the reduced value, on the other hand, is fixed by the shipper with a view to obtaining a low rate of freight, without any knowledge on the part of the carrier that the property is of greater value, it would be a fraud upon the carrier to permit a recovery of a greater sum than that fixed by the shipper.[3]

§ 35. There is no obligation upon the shipper, when tendering goods for transportation, to inform the carrier of their value unless he is asked so to do.[4] If the shipper be not guilty of

merchandise which he promised to deliver at New Orleans. The invoice accompanying the bill of lading was offered in evidence to prove the value of the contents of the box in a suit for damages for its loss. The evidence was rejected on the ground that the invoice was *res inter alias acta* and not emanating from the defendant as the bill of lading. Watson *et al. v.* Yates, 10 Martin's La. Rep. 687.

[1] Elkins *v.* The Empire Trans. Co., 2 W. N. C. (Penna. S. Ct.) 403; McCance *v.* L. & N. R. R. Co., 3 H. & C. 343; 34 L. J. Exch. 39; 10 Jur. N. S. 1058: 12 W. R. 1086; 11 L. T. N. S. 426.

[2] Kimber *v.* Southern Ex. Co., 22 La. Ann. Rep. 158; Southern Ex. Co. *v.* Newby, 36 Ga. 635; Stoneman *v.* Erie R. R. Co., 52 N. Y. 429.

[3] Harvey *v.* Terre Haute & Indianapolis R. Co., 74 Missouri, 538.

[4] Levois *v.* Gale, 17 La. Ann. Rep. 302; Phillips *v.* Earle, 8 Pickering (25 Mass.), 182; Brooke *v.* Pickwick, 4 Bing. 218; Southern Ex. Co. *v.* Crook, 44 Ala. 468; Gorham Mfg. Co. *v.* Fargo, 45 How. Pr. 90; C. & A. R. R. Co. *v.* Baldauf, 16 Pa. St. 67; Relf *v.* Rapp, 3 W. & S. 21; Baldwin *v.* L. & G. W. S. S. Co., 74 N. Y. 125; Parmelee *v.* Lowitz, 74

fraud or concealment as to the nature of his goods, it is the duty of the carrier to inquire their value, should he desire information respecting it.[1]

§ 36. In Massachusetts, Maine, and other States the shipper has been required, by legislation, to state the nature, quality and value of goods shipped.[2] In England the statute 17 and 18 Vict. c. 31, § 7, provides that no more than £50 shall be recovered for loss of or injury to a horse, unless the person shipping it shall, at time of delivery, declare it of higher value, whereupon the railway company may demand a proportionate increase of charge. In construing this Act it has been held[3] that a knowledge by the company of the value of a horse, not derived from a declaration to that effect by the sender, does not give such company any right to demand an increased rate of charge under said section. To entitle the company to demand such increased rate the declaration must be made with an intention, by the sender of the horse, that it should so operate.

§ 37. If the shipper be asked by the carrier the value of the goods shipped, he must answer truly.[4] Any concealment or misleading answer may absolve the carrier from liability for loss.[5] The latter "has a right to demand from the employer

Ill. 116; Warner *v.* Western Trans. Co., 5 Robertson (N. Y.), 490.

[1] Merchants' Desp. Trans. Co. *v.* Bolles, 80 Ill. 473; Gorham Mfg. Co. *v.* Fargo, 45 How. Pr. (N. Y.) 90.

[2] Mass. St. of 1818, c. 122; Gen. Sts. (Mass.) 1860, c. 52, §§ 18–21; Maine St. of 1821, c. 14; Rev. Sts. 1850, c. 35. See, also, U. S. Sts. of 1851, c. 44; U. S. Rev. Sts. (1873) §§ 4281–4289. And Story on Bailments, § 493; Angell on Carriers, § 90 (and Lathrop's note); Dunlop *v.* International Steamboat Co., 98 Mass. 371; Pender *v.* Robbins, 6 Jones, 207; Walker *v.* Transportation Co., 3 Wall. 150; The Barque Whistler, 2 Sawyer (U. S. S. Ct.), 348; Hill Manuf. Co. *v.* Providence Steamship Co., 113 Mass. 495; Hill Manuf. Co. *v.* B. & L. R. R. Co., 104 Mass. 122; Spring *v.* Haskell, 14 Gray, 309; Moore *v.* American Trans. Co., 24 Howard, 1; Hendrick *v.* Virginia R. R. Co., 48 Ga. 545.

[3] Robinson *v.* Southwestern Ry. Co., 19 C. B. N. S. 51; 11 Jur. N. S. 390; 34 L. J. C. P. 234; 13 W. R. 660.

[4] Phillips *v.* Earle, 8 Pickering (25 Mass.), 182; Levois *v.* Gale, 17 La. Ann. Rep. 302; Camden, etc., R. R. Co. *v.* Baldauf, 16 Penna. St. 67; Boskowitz *v.* Adams Express Co., 5 Cent. L. Jour. 58; Green *v.* Southern Express Co., 45 Georgia, 305; Little *v.* Boston, etc., R. R. Co., 16 Am. L. Reg. N. S. 442; 66 Me. 239.

[5] Muser *v.* American Express Co., 1 Fed. Reporter, 382; Hopkins *v.*

such information as will enable him to decide on the proper amount of compensation for his services and risk and the degree of care which he ought to bestow in discharging his trust."[1]

§ 38. Though the shipper may not be asked the value of his goods, he nevertheless must not deceive or delude the carrier by concealing their value, or by a careless treatment of them, or by his manner of shipping them. For, although no actual fraud may have been intended, such concealment or deception has been held to be constructive fraud upon the carrier and he cannot be made answerable in case of a loss of the goods.[2]

§ 39. Thus, the shipper must not deceive or mislead the carrier by sending a check endorsed in blank in an ordinary letter;[3] by sending money in a package by an express company whose rules the shipper knew, required money to be put up, indorsed, and sealed in a particular way;[4] by sending money concealed in a bag of hay,[5] or in a box, with articles of no value;[6] or by sending valuable jewelry, or other merchandise, as property apparently of small value.[7] No one has a right, by concealment or artifice, to disarm a carrier of that vigilance which the nature

Westcott, 6 Blatchford, 64; Mather *v.* American Express Co., 2 Fed. Rep. 49; Housten & T. C. R. R. Co. *v.* Burke, 55 Texas, 323; Cole *v.* Goodwin, 19 Wendell (N. Y.), 251; Fish *v.* Chapman, 2 Georgia, 349; Hollister *v.* Nowlen, 19 Wendell (N. Y.) 234.

[1] Sheldon, J., in Oppenheimer & Co. *v.* U. S. Express Co., 69 Illinois, 62; and see Judson *v.* Western R. R. Co., 6 Allen (88 Mass.), 486; Cole *v.* Goodwin, 19 Wend. (N. Y.) 251.

[2] C. & A. R. R. Co. *v.* Thompson, 19 Ill. 578; H. & T. C. R. R. Co. *v.* Burke, 55 Texas, 323; Cooper *v.* Berry, 21 Ga. 526; Great Nor. R. R. Co. *v.* Shepherd, 14 Eng. L. & Eq. Rep. 367; Lebeau *v.* Gen. St'm Nav. Co., 42 L. J. C. P. 1; 8 L. R. C. P. 88; Orndoff *v.* Adams Ex. Co., 3 Bush (Ky.), 194; Am. Ex. Co. *v.* Perkins, 42 Ill. 458; Earnest *v.* Ex. Co., 1 Woods, 579; Coxe *v.* Heisley, 19 Pa. St. 243; Hollister *v.* Nowlen, 19 Wend. (N. Y.) 234; Everett *v.* Southern Ex. Co., 46 Ga. 303; C. & C. A. R. R. Co. *v.* Marcus, 38 Ill. 219; Orange Co. Bank *v.* Brown, 9 Wend. (N. Y.) 85.

[3] Hayes *v.* Wells, 23 Cal. 185.

[4] St. John *v.* Express Co., 1 Woods, 612.

[5] Gibbon *v.* Paynton, 4 Burr. 2298.

[6] C. & A. R. R. Co. *v.* Thompson, 19 Ill. 578; Magnin *v.* Dinsmore, 62 N. Y. 35; Earnest *v.* Ex. Co., 1 Woods, 573; Belger *v.* Dinsmore, 51 N. Y. 166.

[7] Everett *v.* Southern Ex. Co., 46 Ga. 303; ib., 37 ib. 688; Sleat *v.* Tagg, 5 Barn. & Alderson, 342; Oppenheimer *v.* U. S. Ex. Co. 69 Ill. 62; Pardee *v.* Drew, 25 Wend. (N. Y.) 459.

of the case demands, or deprive him of the increased compensation for a more hazardous or responsible service.[1] There is, however, no fraud or concealment if a carrier be told that a package is very valuable, though he be not told that it contains money.[2]

It is true that, where no artifice is used, carriers may be bound for the contents of all packages carried by them where they do not limit their liability by a notice, since it is their own fault if they do not inquire respecting their value. They are, however, entitled to assume that no greater value is contained in a package than its outside appearance warrants, which is as strong a representation as words. "If the owner be guilty of any fraud or imposition in respect to the carrier, as by concealing the value or nature of the article, or deludes him by his own carelessness in treating the parcel as a thing of no value, he cannot hold him liable for the loss of goods."[3] Where a box containing valuables is so disguised as to resemble those which generally contain only articles of little value and the carrier is thereby imposed upon, it is well settled that he is not liable for its loss.[4] Thus, where a shipper had, as she alleged, packed books, fine clothing, jewelry, etc., in chests such as emigrants ordinarily use and afterwards sued the carrier for loss and damage, she failed to recover, since, although fraud is always partly a question of intent, the shipper's expressed intention to have her boxes appear so that no one would suspect they contained anything valuable, was conclusive in that regard and relieved the carrier from liability.

§ 40. Jewelry was shipped on a vessel in a trunk of the kind generally used in carrying shoes and was labelled "William D. Rapp—glass—this side up—with care." This description was held "equivalent to an assertion that the trunk contained glass and, if untrue, it was such a fraudulent misrepresentation as would prevent a recovery against the owner of the ship, even if the jewelry were purloined by the captain or any one of the crew. A common carrier is answerable for the loss of a box or parcel

[1] Richards *v.* Wescott, 2 Bosworth (N. Y.) 589.

[2] Allen *v.* Sewall, 2 Wend. (N. Y.) 327.

[3] 2 Kent, 603.

[4] Warner *v.* Western Trans. Co., 5 Rob. (N. Y. Supr. Ct.) 490.

of goods, though he be ignorant of the contents or those contents be ever so valuable, unless he made a special acceptance. Even that principle has been doubted; but the better opinion is, that the carrier would be responsible. This is reasonable, because he can always guard himself by a special acceptance or by insisting to be made acquainted with the general nature of the articles and of their value, before he consents to receive them. If he omits this he shall not escape responsibility because of his own negligence. But the rule is subject to a reasonable qualification. If the owner be guilty of any fraud or imposition in respect to the carrier as by concealing the value or nature of the article, or by deluding him by his own carelessness in treating the parcel as a thing of no value, the carrier cannot be held liable for the loss of his goods. Such an imposition destroys all just claim to indemnity; for it goes to deprive the carrier of the compensation he is entitled to, in proportion to the value of the article entrusted to his care and the consequent risk he incurs and it tends to lessen the vigilance the carrier would otherwise bestow. The qualification of the rule is as important to be observed as the rule. It is absolutely necessary for the protection of carriers who would otherwise be exposed to great frauds. With what show of justice can a man ask to be paid for an article of great value when he has induced the carrier by a false assertion, to believe that it is of much inferior value? . . . . In cases of common carriers where there is no notice, the better opinion seems to be that the party who sends the goods is not bound to disclose their value, unless he is asked. But the carrier has a right to make the inquiry and to have a true answer, and, if he is deceived, and a false answer given, he will not be responsible for any loss. If he makes no inquiries and no artifice is used to mislead him, then he is responsible for any loss however great the value may be.[1] When, however, the shipper voluntarily informs the carrier of the value or of the nature of the article, what need of further inquiry? Surely he cannot complain that the carrier believes his statement to be true. If untrue, it would be a violation of every principle of common justice, to cast the responsibility

[1] Story on Bailments, 362.

upon the innocent owner [of the vessel] merely because his agent puts faith in the declarations of the shipper. And what difference is there in effect between the case put, and labelling a box or trunk as containing an article differing in nature and value from its true character? The one is as likely to delude the carrier as the other and is as likely to be used as a means of fraud."[1]

If a station agent, however, checks a trunk as ordinary personal baggage, having reason to believe that it contains jewelry and that the passenger is not entitled to have it carried as personal baggage, the company is liable in case of negligence, for the value of its contents.[2]

§ 41. The question whether or not fraud has been practised, may be either for the court or the jury. If the facts are clear and undisputed and sufficient to establish a fraudulent concealment or imposition by the shipper upon the carrier regardless of the shipper's intention, the question of fraud is one of law for the court. When, however, it depends on conflicting evidence, or the facts are merely evidence from which fraud or intent of fraud might be inferred as a conclusion from a variety of facts and circumstances, then, although the facts may be uncontradicted, the question of fraud is a question of fact for the consideration of a jury.[3]

§ 42. Where money is transported under a bill containing the statement "said to contain" a given amount, the recital is not even *prima facie* evidence that the amount stated was received by the carrier. Where a package of money in a sealed envelope was received by a carrier for transportation and a receipt given reciting that the package was "said to contain $1182.15," it was held that the recital was not even *prima facie* evidence that the package did, in fact, contain the said sum, although there was evidence that the agent of the carrying company was requested to count the money at the time of shipment and he declined to do so.[4]

[1] Rogers, J. in Relf *v.* Rapp, 3 W. & S. (Penna.), 25. See also Coxe *v.* Heisley, 7 Harris (Penna.), 243.

[2] Cent. Trust Co. *v.* Wabash etc. R. R. Co., 39 Fed. Rep. 417; Jacobs *v.* Tutt, 33 Id. 412.

[3] Magnin *v.* Dinsmore, 6 J. & Sp. (N. Y.) 248.

[4] Fitzgerald *v.* Adams Express Co., 24 Indiana, 447.

In a Pennsylvania case the endorsement, "said to contain $300," made on a package by an express company's agent, was held to be evidence of value in a suit to recover the loss of the package. HARE, P. J., in delivering the opinion, said: "On mature consideration we are unable to agree with the argument for the defendant, that the words 'said to contain $300' in a receipt given by an express company for a package entrusted to their care, are not evidence of the amount which the package contained, in a suit brought to recover damages for its loss. If the plaintiff had stated orally, when the package was delivered, that it held $300, and that the defendants had failed to reply, he would have been entitled to presume that they were willing to rely on his good faith without counting or otherwise verifying the amount, and the introduction of the allegation into a receipt written by the defendants, makes the case much stronger against them. If the plaintiff had claimed more than $300, the defendants might with reason have relied on the limitation in the receipt as conclusive, and they cannot, after making part of the contract for one purpose, shut it out because it makes against them."[1]

§ 43. Of the acknowledgment contained in the bill, that the goods have been received by the carrier "in good order and condition" or "in good order and well conditioned," three propositions may be affirmed.

First—The statement refers to the external or to the apparent condition of the goods.

Second—As between the original parties, the recital is not conclusive proof of good condition.

Third—It is *prima facie* evidence of the fact and raises a presumption that the goods were in the condition stated, the *onus* of rebutting which, is on the carrier giving the bill of lading.

§ 44. The first proposition has been stated by Mr. Chief Justice SHAW, in the case of Hastings *v.* Pepper,[2] thus: "The signing of a bill of lading acknowledging to have received the goods in question, in good order and well conditioned, is *prima facie* evidence that as to all circumstances which were open to inspection and visible, the goods were in good order, but it does not

[1] Weil *v.* Express Co., 7 Phila. Rep. 88.

[2] 11 Pickering, 41.

preclude the carrier from showing, in case of loss or damage, that the loss proceeded from some cause which existed but was not apparent when he received the goods and which, if shown satisfactorily, will discharge the carrier from liability. But in case of such loss or damage, the presumption of law is, that it was occasioned by the act or default of the carrier and of course the burden of proof is upon him to show that it arose from some cause existing before his receipt of the goods for carriage and for which he is not responsible."

The Supreme Court of the United States set the seal of its approval to this statement of the law by adopting it verbatim in the opinion of the court delivered by Mr. Justice WAYNE in the case of Nelson *v.* Woodruff.[1] Here the facts were as follows: Certain lard was shipped on board the "Maid of Orleans" of which Nelson and others were the owners. The bills of lading recited that the goods had been shipped in good order and condition. Cross-libels were filed—the owners claiming freight for the cargo as stated in the bill, the consignees claiming damage for the non-delivery of a large part of the lard. It was contended that the lard had not been in good order when put on board, inasmuch as it was then in a liquid state and had in that condition been put into barrels, which, with the heat of the weather, had started them and had caused leakage during transportation and that the leakage had not been caused by neglect. Testimony was submitted showing the effect of heat and the barreling of lard in a liquid state in producing more than usual leakage. It was held that such proofs were applicable, although the bills of lading recited that the lard was shipped in good order and condition.

§ 45. The construction given to the clause by Mr. Chief Justice SHAW has been followed and confirmed by other decisions, holding that the words "in good order," refer only to the external or apparent condition of the goods and that such words create no contract with reference to the condition of contents of packages, bales, boxes, etc.[2] External appearance is not a true

[1] 1 Black, 156. See also The Delaware, 14 Wallace, 601.

[2] The Prosperino Palasso, 29 L. T. N. S. 622; Gauche *v.* Storer, 14 La Ann. Rep. 411; West *v.* Stm. Berlin, 3 Iowa, 532; Currell *v.* Johnson, 12 La. 290; Moore *v.* Harris, 2 Quebec L. Rep. 147; The Peter der Grosse, 1

test of internal condition[1] and the clause of the bill can be applied to the latter only so far as it may be inferred from the former.[2] For example, applied to the shipment of cotton, the phrase means externally in good shipping condition at the time it is received by the carrier but does not refer to or warrant the internal quality or condition of the cotton in the bales.[3]

§ 46. The reason for the rule is plain. To extend the application of his receipt for goods "in good order," etc., to contents of shipments would be to bind the carrier to a statement made upon information derived solely from the shipper or, to compel the carrier to open every bale, box or package presented for transportation. The former course is unreasonable, the latter unlawful[4] as well as unreasonable.

"The adoption of the principle that the bill of lading is conclusive on the carrier, not only as to the apparent but also as to the actual condition of the goods, would impose on him the necessity, for self-protection, of opening every box of merchandise to examine and ascertain the condition of its contents before he receives it. . . . . The bulk of every package would have to be broken up and examined, and the contents of every box, of merchandise of the most delicate texture, opened and handled, before a bill of lading could be safely signed. Public policy, therefore, prohibits a rule which would be productive of such results and which, instead of benefiting, would inflict an injury upon the community."[5]

§ 47. We may now pass to the second proposition, namely, that the statement in the bill, (whether of a railroad company or other carrier) that goods have been received in good order is not conclusive as between the original parties. It may be explained or contradicted by parol evidence.[6] In the case of

L. R. Probate Div. 414, 34 L. T. N. S. 749; Vaughan *v.* 630 Casks Sherry Wine, 7 Benedict Reps. 506; Aus *v.* Kempf, 10 Benedict Rep. (U. S. D. C.) 231; Blaine *v.* Maller, 2 Juta's Rep. Cape of Good Hope, E. D. 133; Porter *v.* Robinson, Ib. 16; Italian Bark Vincenzo T., 10 Benedict (U. S. D. C.), 228.

[1] Carson *v.* Harris, 4 Greene (Iowa), 516.

[2] Keith *v.* Amende, 1 Bush, 455.

[3] Bradstreet *v.* Heran, 2 Blatch. C. C. 116.

[4] O'Brien *v.* Gilchrist, 34 Me. 554.

[5] Breck, Justice, in Gowdy *v.* Lyon, 9 B. Mon. (Ky.) 112.

[6] Mitchell *v.* U. S. Ex. Co., 46

McIntosh *v.* Gastenhofer,[1] Mr. Justice MARTIN says: "The general rule is certainly that when goods are acknowledged to be received in good order and are delivered in bad, the carrier is responsible, but it is open to the exception that he may show that the damage arose from causes which existed anterior to the bailment, or from defect in the thing itself."

§ 48. It is competent to show by evidence *aliunde* that the goods were not in good order when shipped;[2] to show that they were damaged before the carrier received them,[3] whether that damage was done by the shipper or by any previous carrier of the goods;[4] to show that the casks in which liquids were shipped were unsound, or badly made so as to cause leakage;[5] or even to prove that the carrier wished to receipt for the goods as in poor condition, but was not allowed to do so.[6] In a case where the goods were injured in their delivery to the carrier and he saw and knew it, it has been held that the carrier cannot give evidence to contradict his bill of lading receipting for goods in good order unless it be proved that a fraud or imposition was practised upon him. This would not be such a latent defect as would excuse him from liability for loss beyond that which was occasioned by the peculiar nature of the article carried.[7]

§ 49. The third proposition may be more accurately stated thus: though not conclusive, the bill is yet *prima facie* evidence

Iowa, 214; Barrett *v.* Rogers, 7 Mass. 297; The Adriatic, 16 Blatchf. C. C. 424; Nelson *v.* Woodruff, 1 Black, 156; Clark *v.* Barnwell, 12 Howard, 272; Hastings *v.* Pepper, 11 Pickering (Mass.), 41; C. & A. R. R. Co. *v.* Benjamin, 63 Ill. 283; Porter *v.* C. & N. W. R. R. Co., 20 Iowa, 73; Stm. Missouri *v.* Webb, 9 Mo. 193; Bradstreet *v.* Heran, 1 Abbott, 209; Richards *v.* Doe, 100 Mass. 524; Choate *v.* Crowninshield, 3 Clifford's C. C. Rep. 184; Ellis v. Willard, 9 N. Y. 529; Wetzler *v.* Collins, 70 Me. 290.

[1] 2 Robinson (Louisiana), 403. See also, Turner *v.* Ship Black Warrior, 1 McAllister, 181.

[2] Wood *v.* Perry, 1 Weigh. (Ohio), 240; Kimball *v.* Brander, 6 La. 711; Ship Howard *v.* Wissman, 18 Howard, 231.

[3] O'Brien *v.* Cilchrist, 34 Me. 554; Bissell *v.* Price, 16 Ill. 408.

[4] G. W. R. R. Co. *v.* McDonald, 18 Ill. 172.

[5] Nelson *v.* Stephenson, 5 Duer (N. Y.), 538.

[6] Tierney *v.* N. Y. C. & H. R. R. Co., 67 Barb. (N. Y.) 538.

[7] Warden *v.* Greer, 6 Watts, 424. See Barrett *v.* Rogers, 7 Mass. 297.

that so far as the goods were visible, or open to inspection, they were in good order and condition when shipped. The presumption thus raised, throws the burden upon the carrier of showing that the goods were not in the condition stated in his bill of lading.[1] In the case of Bond *v.* Frost, Mr. Justice SLIDELL says: "If it be admitted that the clause in the bill of lading as to condition of goods when received is open to explanation, still it is certain that the receipt throws the burden of proof upon the vessel and its recital cannot be overthrown or qualified except by evidence of a very clear and convincing character. The recital of the bill of lading is not to be weakened by a conjectural showing."[2]

Again, it has been held that the carrier cannot stop by showing that goods were delivered to him in insufficient packing and that the defect was not discoverable by him. He must go further and show that the injury to the goods actually resulted from such insufficient packing.[3]

§ 50. A bill of lading which contains no admission of the receipt of goods in good order or a promise so to deliver them, but provides that upon delivery of the cargo in sound condition the freight shall be paid, is to be construed as impliedly admitting the receipt of the cargo in good order.[4]

§ 51. The admission as to the condition of the goods has been occasionally qualified by the use of the phrase "in *apparent*

[1] Choate *v.* Crowninsheld, 3 Clifford, C. C. 184; I. C. R. Co. *v.* Cowles, 32 Ill. 116; Tarbox *v.* Eastern Stm. Co., 50 Me. 339; Breed *v.* Mitchell, 48 Ga. 533; Montgomery *v.* Ship Abbey Pratt, 6 La. Ann. Rep. 410; Hart *v.* Ship Jane Ross, 5 ib. 264; Ship Rappahannock *v.* Woodruff, 11 ib. 698; Whitney *v.* Gauche, ib. 432; Austin *v.* Talk, 20 Texas, 164; Richards *v.* Doe, 100 Mass. 524; Arend *v.* Liverpool, etc. Stm. Co., 64 Barbour (N. Y.), 118; Nelson *v.* Woodruff, 1 Black, 156; Nelson *v.* Stephenson, 5 Duer (N. Y.), 538; The Adriatic, 16 Blatchf. C. C. 424; M. & W. P. R. R. Co. *v.* Moore, 51 Ala. 394; Archer *v.* The Adriatic, 9 Cent. L. Jour. 201; Carson *v.* Harris, 4 G. Greene, 516; Mitchell *v.* U. S. Ex. Co., 46 Iowa, 214; West *v.* The Berlin, 3 ib. 532; The Freedom, L. R. 3 P. C. 594; The Olbers, 3 Ben. 148; Vaughan *v.* 330 Casks, 7 ib. 506; Price *v.* Powell, 3 N. Y. 322; C. & A. R. R. Co. *v.* Benjamin, 63 Ill. 283; Coulthurst *v.* Sweet, L. R. 1 C. P. 649; The Ship Black Hawk, 9 Benedict (U. S. D. C.), 207; The Pacific, Deady (D. C.), 17.

[2] 6 La. Ann. Rep. 801.

[3] Zerega *v.* Poppe, 1 Abbott Bros., 397.

[4] The Ship Zone, 2 Sprague, 19.

good order," etc. The interpretation given by the Courts to the simple statement in "good order," etc., would seem to render this qualification practically unnecessary and the insertion of the word "apparent" does not change the legal effect of the clause.[1]

"When a common carrier receives goods for shipment and gives the consignor a bill of lading in which the goods are described to be 'in *apparent* good order,' we see no reason why the bill of lading should not be held *prima facie* evidence that the goods were in good condition."[2]

Where goods are shipped, described as "in apparent good order and condition," and are delivered by the carrier in the same apparent external good order, the burden of proving that the goods are not as delivered, is thrown upon the shipper. In the case of The California the libellants claimed for goods which they alleged were in one of five cases described in the bill of lading "as shipped in apparent good order, value and contents unknown." The goods were not delivered by the carrier, although the case was. It was held that the libellants were bound to show that the goods were in the case when it was delivered to the carrier, and having only given evidence tending to show that they were therein when the case was delivered to the truckman to be taken to the vessel and no other evidence, the libel should be dismissed.[3]

§ 52. The effect of the phrase was considered under a somewhat unusual state of facts in the case of Evans *v.* The Atlanta and West Point Railroad Company.[4] This suit was brought for the recovery of damages to certain corn delivered at St. Louis, Mo., under a bill of lading which recited that the corn was "received in apparent good order on board good steamboat Emma C. Elliott to be conveyed from St. Louis to Memphis and from thence by the Memphis & Charleston R. R. with connecting R. R.'s to be delivered in like good order at the company's depot at La Grange, Ga." The corn was de-

[1] The Oriflamme, 1 Sawyer, 176.

[2] Ill. Cent. R. R. Co. *v.* Cobb, 72 Ill. 148. See also Blade *v.* C., St. P. & F. du L. R. Co., 10 Wisconsin, 4.

[3] The California, 2 Sawyer's Reps. (D. C. Oregon), 12.

[4] 56 Georgia, 498.

livered at La Grange badly damaged. The suit was brought against the defendant as the last company which received the corn in good order. On this bill of lading it was held that there was no presumption that the corn was received by the defendant in good order. The indorsements on the bill, as to the condition of the corn, by the agents of the connecting carriers, were not receivable as evidence and hence there was no legal proof as to the condition of the corn when it passed into the custody of the defendant company.

CHAPTER IV.

EFFECT OF QUALIFYING CLAUSES, "CONTENTS UNKNOWN," "WEIGHT UNKNOWN," ETC.

"Quantity, etc., unknown, generally," § 53.
"Contents unknown," as affecting the description of goods, § 54.
"Contents unknown," as affecting the statement of the condition of goods, § 55.
"Contents and gauge unknown," § 56.
"Contents and value unknown," § 57.
"Weight unknown," § 58.
"Contents and weight unknown," § 59.
"Quantity and quality unknown," § 60.
"Weight, contents, and value unknown," §§ 61, 62.

§ 53. The receipt in the bill of lading is, as we have seen, either *prima facie* or conclusive evidence of the reception of certain goods by the carrier and of the quantity, weight, quality, value and condition of those goods. To diminish the force of these statements or admissions, carriers have frequently added thereto a qualification in their bills to the effect that the quantity, weight, quality, or value is "unknown." This qualification is either stamped on the face of the bill or is made to form one of its written or printed clauses. In effect, it means that the quantity, etc., recited in the bill was so represented to the carrier when accepted by him for transportation, but that he intends to assume no personal responsibility for the truth or accuracy of the statements.

The qualifying clause may affect the description of the goods or the statement of their quantity, quality, weight, value, or condition. While intended by the carrier to relieve himself from responsibility for the definite recitals of the bill, it sometimes operates to his disadvantage. We may examine the decisions in which the effect of each of the several clauses used, has been construed and determined.

§ 54. The most common clause is "contents unknown." If the carrier guards his acknowledgment of the receipt of goods by saying "contents unknown," so that he does not charge

himself with the receipt of any goods in particular, the bill of lading alone is not evidence, either of the quantity of the goods or of property in the consignee.[1]

Where a bill of lading receipted for certain silk handkerchiefs as "domestics" and over the signature were inserted the words "contents unknown," it was held that the carrier need only answer for the missing package according to its actual contents.[2] Where a bill of lading stated that certain hogsheads contained bacon but said also "contents unknown," it was held that the carrier did not admit the fact to be as stated and no presumption arose as to the true state of the goods at the time of shipment.[3]

In an action for the value of a "package of merchandise" which a carrier failed to deliver and which, in fact, was valuable jewelry, it was held, the bill reciting that the contents were unknown, that if the carrier has made no inquiry and no artifice has misled him, he will be responsible for any loss, however great the value of the article.[4]

§ 55. Where to the clause "received in good order and condition" was joined "contents unknown" in a bill of lading, it was held, by the Supreme Court of the United States, that "the acknowledgment of the master as to the condition of the goods when received on board extended only to the external condition of the cases excluding any implication as to the quantity or quality of the article, condition of it at the time received on board, or whether properly packed or not in the boxes, and if the evidence on the part of the defence laid a foundation for a reasonable inference that the damage resulted from an imperfection in the goods when packed in the cases, or had occurred previously to their being shipped on board, the burden was thrown upon the libellants [shippers] to rebut the inference."[5]

A bill of lading acknowledged the receipt "in good order and condition" of casks containing bristles, which were covered

[1] Haddow *v.* Parry, 3 Taunton, 303 (Eng. C. P.).

[2] Fassett *v.* Ruark, 3 La. Ann. Rep. 694.

[3] Vernard *v.* Hudson, 3 Sumner, 405 (U. S. C. C.).

[4] Levois *v.* Gale, 17 La. Ann. Rep. 302.

[5] Clark *v.* Barnwell, 12 Howard, 272. Opinion by Mr. J. Nelson.

with matting secured by cords, and engaged to deliver them in like good order and condition to the consignees. The bill of lading also contained the clause "weight and contents unknown." The court held that there was no admission by the master in the bill of lading as to the condition of the goods, beyond that visible to the eye, or apparent from handling the casks, or their outside protection, whatever that might be, and that the burden of proof was on the shipper, in the first instance, to prove the condition of the goods at the time of shipment.[1] The shipper is, however, under no obligation to offer in evidence more than the bill of lading containing the admission "received in good order and well conditioned—weight and contents unknown"—until the carrier has given affirmative evidence tending to show that the actual condition of the goods at the time of shipment was not as stated.[2]

§ 56. In a bill of lading for a specified number of barrels of molasses, the addition of the words "contents and gauge unknown" cannot be considered as implying more than ignorance of the quantity or quality. The fact of there being molasses in the barrels is not to be implied.[3]

§ 57. Where a bill of lading receipted in the margin in writing for "articles 30 bbls. eggs" and the printed portion contained the words "contents and value unknown," it was held that the latter words meant simply that the condition, kind, quality and value of the eggs were unknown, and that against a *bona fide* indorsee of the bill the carrier was estopped from denying that the barrels contained eggs.[4]

A carrier signed bills for 701 tons of cattle bones, "weight and contents unknown." On arrival at destination there were but 386 tons on board the carrier's vessel. The captain offered to deliver this amount (which he claimed and offered to prove was all that he had received), on condition of receiving real freight for the 386 tons and dead freight for the 210 tons. The House of Lords held that "the bills of lading signed by

[1] The Columbo, 3 Blatchf. 521.

[2] Baxter *v.* Leland, Abbott's Adm. Rep. (N. J. Dist. Ct.) 348.

[3] Nelson *v.* Stephenson, 5 Duer (N. Y.), 538.

[4] Miller *v.* H. & St. J. R. Co., 24 Hun (N. Y.), 607; but see Nichal & Co. *v.* Castle, 9 Beav. H. C. Rep. 321 for the rule in England.

the master were *prima facie* evidence that the quantities of bones mentioned in them had been received on board," and that "though the master had not authority to sign bills of lading for a greater quantity of goods than is actually put on board, yet, as it is not to be presumed that he has exceeded his duty, his signature to the bills of lading is sufficient evidence of the truth of the contents to throw upon the ship owner, the onus of falsifying them and proving that he received a less quantity of goods to carry than is thus acknowledged by his agent." The ship owner, having satisfactorily rebutted this presumption by evidence, was held entitled to recover both his real and dead freight.[1]

The statement in a bill "shipped in apparent good order and condition five cases of merchandise, value and contents unknown," has reference to the external condition of the cases and excludes any inference that the carrier thereby admits any thing as to the quantity or quality of the contents of the cases at the time of delivery to him, beyond what was visible to the eye or apparent from handling the same.[2]

§ 58. If, in addition to a statement of a specific weight of goods, the expression "weight unknown" be found in the bill of lading, the carrier is only bound to deliver the weight actually shipped,[3]—the statement of the specific weight being interpreted in such a bill to mean "about" or "estimated at" so much, without admitting such estimate to be exact. The clause "I do not know the weight," inserted by a master in a bill of lading given for about 200 tons, casts on the consignee the burden of proving that he did not receive what was actually shipped.[4]

§ 59. Where there is a memorandum of the supposed or real weight on the margin, and the words "contents and weight unknown" are inserted in the body of the bill, the latter exclude the inference that the carrier is to be bound by the memorandum,[5] and there is no admission by the master as to the condition

[1] McLean *v.* Fleming, Law Rep. 2 H. L. (S. C. App.) 128.

[2] The California, 2 Sawyer (Dist. Ct. Oregon), 12.

[3] Shepherd *v.* Naylor, 5 Gray, 591.

[4] Schultz *v.* The Pietro G., 40 Fed. Rep. 497.

[5] The Andover, 3 Blatchford, 303 (U. S. C. C.).

of the goods, beyond that visible to the eye or apparent from handling the casks, boxes, or other outside covering whatever it may be. When, in such a case, a question arises as to the condition of the contents of casks or bales, the burden rests on the shipper in the first instance to prove their condition at the time of shipment.[1] Where, however, a bale of cloth was shipped under such a bill and, on delivery to the consignee, it was found that the outer and inner coverings were injured and that a piece of cloth had been removed, it was held that it was incumbent on the carrier to show that the injury was only external.[2]

Where the agent of the carrier in point of fact, knew what the contents of the boxes were and failed to exercise the precaution necessary to their safe delivery, the carrier cannot shelter himself behind the words "weight and contents unknown" in the bill of lading.[3]

§ 60. The quantity and quality of certain wheat covered by a bill of lading was stated therein to be "unknown" On an alleged failure to deliver the whole amount shipped, the burden was upon the shippers to show the quantity of wheat delivered for transportation.[4]

A bill of lading with the phrase "in good order and condition" qualified by the words "quantity and quality unknown," neither admits, as against the ship owners, that the goods were shipped in such condition, nor furnishes the proof required by law from the shippers, as to the state of the goods when put on board.[5]

A ship was chartered to carry a cargo of grain from A. to B., for a freight of 7*s.* "per imperial quarter delivered" and the charter party provided that "in the event of the cargo or any part thereof being delivered in a damaged or heated condition, the freight shall be payable upon the invoice quan-

[1] The Columbo, 3 Blatchford, 521; Wentworth *v.* Ship "Realm," 16 La. Ann. Rep. 18.

[2] The Energie, 2 Asp. Mar. Law Cases, 296.

[3] Brig. May Queen, Newberry's Adm. (U. S. D. C.), 464.

[4] Compart *v.* Steamship Prior, 2 Federal Reporter, 819.

[5] The Prosperino Palasso, 29 L. T. N. S. 622; The Ida, 32 L. T. N. S. 541.

tity taken on board, as per the bill of lading, or half freight upon the damaged or heated portion at the captain's option." Under this charter-party 2368 imperial quarters were shipped on board at A., and the master signed a bill of lading with the following words written at the foot, (as was proved to be usual in the grain carrying trade) "quantity and quality unknown." The ship experienced bad weather and 80 quarters were damaged by heating. It was held that the master was entitled to be paid freight on the invoice quantity taken on board notwithstanding the words written at the foot of the bill.[1]

§ 61. Where a bill of lading purported to be for fifty tons of coal and contained a printed clause "weight, contents, and value unknown," and similar words were written above the signature of the master, it was held that this did not amount to an admission by the master that he had received fifty tons of coal on board.[2]

The force of the qualification in the bill of lading that the contents, weight, value, etc., of the goods are unknown has been fully considered and ably discussed in the opinion of Sir C. SARGENT, C. J., in the case of Nicol *v.* Castle. The question arose under the English statutes, making the representations in the bill conclusive against the carrier. Sir C. SARGENT says:[3]—

"The question, is the bill of lading in the hands of the plaintiff's consignees for valuable consideration conclusive evidence as against the defendant of the shipment of fifty tons, turns upon the construction to be put on the Indian Bill of Lading Act 9, of 1856. The English act on the same subject (18 and 19 Vict. c. cxi.), of which the Indian act is a literal copy, has come under the consideration of the English courts of law on several occasions, but never so far as we are aware, except incidentally, on the point on which this case turns, namely, the liability of the master signing the bill of lading to a consignee for value under section 3 of the act. Section 1 gives a consignee of the goods or the indorsee of the bill of lading

[1] Tully *v.* Terry, Law R. 8 C. P. 684; s. c. 42 L. J. C. P. 240.

[2] Nicol & Co. *v.* Castle, 9 Bom. H. C. Rep. 321; Jessel *v.* Bath, 2 L. R. Exch. 267; 36 L. J. Exch. 149; 15 W. R. 1041.

[3] Vol. ix., Bom. H. C. Rep. 321.

(to whom the property is intended to pass) the same rights of suit as if the contract had been with himself, and, therefore, in the present case, as the bill of lading does not amount to an admission by the master that fifty tons of coal were shipped on board, the plaintiff could not, as a simple consignee of the coal, recover under that section against the master without proving that the fifty tons were actually shipped. Section 3, however, places a consignee or indorsee, who has given value, in a far better position as regards the master or other person signing the bill of lading. It says that in their hands the bill of lading, representing goods to have been shipped on board, shall be conclusive evidence of such shipment as against the master or other person signing the bill of lading, notwithstanding that such goods, or some part thereof, may not have been so shipped, unless the holder of the bill of lading shall have had actual notice, at the time of receiving the same, that the goods had not, in fact, been laden on board, and leaves only one ground of defence open to the person so signing the bill of lading to plead, namely, that the misrepresentation was caused without his default and wholly by the fraud of the shipper.

"The first important question, then, is, what was the amount of coal which this bill of lading represented as having been shipped? Did it represent, to third persons who might deal with the shipper that the exact amount of fifty tons of coal had been shipped? If the written and printed words are reconcilable, as they must be taken to be for the purposes of this argument, we are at a loss to see on what ground it can be contended that the bill of lading taken as a whole, represents to the public as a fact on which they may rely, that fifty tons of coal had been shipped. Undoubtedly the bill of lading commences by representing that there have been shipped on board the steamship 'Hutton,' fifty tons of coal, but the representation referred to in section 3 must, we think, mean the representation made by the whole instrument. This appears from the preamble which says: 'Whereas it frequently happens that the goods in respect of which bills of lading purport to be signed, have not been laden on board, and it is proper that such bills of lading in the hands of a *bona fide* holder for value should not be questioned by the master or other person signing

the same, on the ground of the goods not having been laden.' Here, however, the bill of lading does not purport to be signed by the master in respect of fifty tons of coal, exactly. The object is to protect the *bona fide* holder, without notice, and to make those persons liable who have represented to him through the bill of lading that a certain amount of goods have been shipped. Here, however, the bill of lading gives him clear notice that the master, upon whose signature he is supposed to rely, does not admit that fifty tons were shipped. This conclusion follows irresistibly from the previous decisions as to the effect of the printed condition or the written words. If they are reconcilable and the bill admits of reasonable and fair explanation, it cannot be said that the bill of lading was signed by the master in respect of fifty tons of coal. But it was said that the Act prevents the master from guarding himself against the effect of the written words, or, in other words, the object of the Act was to throw on him, as between himself and *bona fide* holders, the obligation of ascertaining the truth of the 'written words.' But this would be to put a construction on the Act far beyond the object as stated at length in the preamble, and would, in our opinion, require distinct words to that effect—words which are certainly not to be found in this Act.

"This view of the Act is adopted by the Chief Baron and Mr. Baron MARTIN, in the parallel case of Jessel *v.* Bath,[1] although it was not necessary to decide the question, as the action was against a person who had not signed and who was held by the Court not to be bound by the person signing. They both, however, expressed an opinion that no action could have been brought on the bill of lading, under section 3, of the Act, even against the person signing. We are of opinion, therefore, that this question should be answered in the negative."

§ 62. "A mere receipt for the goods without the words 'in good order and condition,' has the same effect, notwithstanding the addition of the words, 'weight, contents and value unknown.' Therefore when on delivery, the goods are found to be injured, it will be presumed that they were properly packed in a fit state for transportation unless there is some-

[1] Law R., 2 Ex. 267.

thing in their appearance or condition to afford ground for a contrary inference or unless some evidence to that effect is given."[1]

The converse of the rule is also true. Therefore, where the carrier contracts to carry certain closed cases alleged to contain specific goods [linen], but adds "contents, weight and value unknown," he must carry the cases whatever they contain. "The effect of the words is to do away with the description of the goods as linen."[2]

[1] English *v.* Ocean Stm. Nav. Co., 2 Blatchford, C. C. 425; The Peter der Grosse, 1 L. R. Prob. Div 414; 34 L. T. N. S. 749.

[2] Lebeau *v.* Gen. Steam Nav. Co., 42 L. J. C. P. 1; 8 L. R. C. P. 88.

CHAPTER V.

A BILL OF LADING IS A CONTRACT—RULES OF CONSTRUCTION.

A bill of lading is a contract, § 63.
As such it cannot be varied in its terms by parol proof, § 64.
Nor by contemporaneous verbal agreements, § 65.
Verbal agreement is not merged where terms are omitted by mistake from the bill, § 66.
Illustrations of the principle, § 67.
Variations of the rule, § 68.
Parol evidence is admissible to explain ambiguities, §§ 69, 70.
Contract is to be gathered from the whole instrument, § 71.
Modification of the rule, § 72.
Reference to charter party, §§ 73, 74.
Written prevail over printed provisions, §§ 75, 76.
The bill is to be construed according to the intention of the parties, § 77.

§ 63. A bill of lading is more than a receipt. It is an agreement for a consideration to transport certain goods to a specified place and there to deliver them to a person named or to his order or assigns. It is a written contract for the performance of a certain duty.[1] The contract between ship and shipper is contained in the bill delivered to the shipper. If the bill kept by the captain differs from the shipper's bill, the latter prevails and the captain's bill must fall.[2] In Dunn *v.* Branner,[3] it was held that the bill does not create the contract

[1] Shaw *v.* Merchants' N. B. of St. L., 8 W. N. C. (Penna.), 221; Hostetter *v.* Baltimore, etc., R. R. Co., 11 Atl. Rep. (Pa.), 609; Wayland *v.* Mosely, 5 Ala. 430; Ontario Bank *v.* Hanlon, 23 Hun (N. Y.), 283; Bishop *v.* Empire Trans. Co., 48 How. Pr. (N. Y.), 119; Horrell *v.* Parish, 26 La. Ann. Rep. 6; C. & N. W. R. R. Co. *v.* N. L. Packet Co., 70 Ill. 217; Helliwell *v.* G. T. R. W. Co., 10 Bissel, 170; Lawrence *v.* McGregor, Wright (Ohio.), 193; Huntingdon *v.* Dinsmore, 4 Hun (N. Y.), 66; Ricketts *v.* B. & O. R. R. Co., 61 Barb. (N. Y.), 18; Knowles *v.* Dabney, 105 Mass. 437; Randall *v.* Dabney, ib.; Wallace *v.* Matthews, 39 Ga. 617; Swett *v.* Black, 2 Spragues Dec. 49; Wilde *v.* Mer. Desp. Trans. Co., 47 Iowa, 272.

[2] Ontario Bank *v.* Hanlon, 23 Hun (N. Y.), 283.

[3] 13 La. Ann. Rep. 453.

between the shipper and the carrier and that it has only been adopted as a convenient mode of establishing the contract. In Swift *v.* Pacific, etc., Steamship Co., it was held that if the bill of lading made out by the carrier does not conform to a special contract between the parties, the contract and not the bill must control.[1]

§ 64. Parol evidence is inadmissible to vary the terms or legal import of a bill of lading which is free from ambiguity as to the destination of the property or the freight to be paid or any other of the terms of the contract for carriage.[2] The rule, however, that the bill cannot be varied by parol, is binding only upon the parties to it. The rule does not apply to other persons whose rights are incidentally affected by the bill of lading.[3] The principle that the bill as a contract is not to be varied by parol evidence, does not exclude testimony showing that it is the contract of other persons than those in whose name it is executed. Thus a plaintiff was permitted to charge by parol evidence, the owner of a steamboat with a loss under a bill given by the master in his own name.[4]

§ 65. The bill of lading, receipt, or other voucher expressing the terms and conditions of transportation, accepted without objection by the shipper from the carrier, in the absence of proof of fraud or mistake, is to be taken as the sole evidence of the final agreement of the parties and by it their duties and

[1] 106 N. Y. 206.

[2] Fitzhugh *v.* Wiman, 9 N. Y. 559; Collender *v.* Dinsmore, 55 ib. 200; Sayward *v.* Stevens, 3 Gray (64 Mass.), 97; Creery *v.* Holly, 14 Wend. (N. Y.), 26; Sproat *v.* Donnell, 26 Maine, 187; Center *v.* Torry, 8 Martin's La. Rep. 206; Hostetter *v.* Baltimore, etc., R. R. Co., 11 Atl. Rep. (Pa.), 609; Camden & Atl. R. R. Co. *v.* Bausch, 6 Cent. Rep. 121; Petrie *v.* Heller, 35 Fed. Rep. 310; Pecks *v.* Dinsmore, 4 Porter (Ala.), 212; Babcock *v.* May, 4 Ohio, 346; May *v.* Babcock, ib. 334; McTyer *v.* Steele, 26 Ala. 487; White *v.* Vankirk, 25 Barbour (N. Y.), 16; Ind. & Cin. R. R. Co. *v.* Remmy, 13 Ind. 518; White *v.* Ashton, 51 N. Y. 280; Simmons *v.* Law, 8 Bosw. 213; Arnold *v.* Jones, 26 Texas, 335; Tudor *v.* Macomber, 14 Pick. (Mass.) 34; Wolfe *v.* Myers, 3 Sandf. 7; Wayland *v.* Moseley, 5 Ala. 430; Higgins *v.* U. S. M. S. S. Co., 3 Blatchf. (U. S. C. C.), 282; Wayne *v.* Str. Gen. Pike, 16 Ohio, 421; Scovill *v.* Griffith, 12 N. Y. 509; Dixon *v.* C. & I. R. R. Co., 4 Bissell's Rep. 137; Adams Ex. Co. *v.* Boskowitz, 107 Ill. 660; Ide *v.* Sadler, 18 Barb. 32.

[3] The Phebe, 1 Ware's Rep. (D. C. Me.), 263.

[4] McTyer *v.* Steele, 26 Ala. 487.

liabilities must be regulated. Resort cannot be had to prior or contemporaneous parol negotiations or agreements to vary its terms.[1] The parties are supposed to have written out all that they deemed necessary to give full expression to their intention. Thus, where it was not claimed that there was anything on the face of the instrument which required the master of a vessel to take the inside, rather than the outside, route from New York to Baltimore, there could be no proof allowed of a preliminary agreement to establish such an obligation. If the shipper intended to make this a part of the contract he should have had the provision embraced in the bill. Nor is evidence of an agreement of the master to go by the inland route properly admissible.[2] Where a carrier stipulated in writing that, in forwarding goods beyond his route, he should have power to forward by any safe and prudent customary mode, it has been held to be improper to permit a prior or contemporaneous oral obligation to control the stipulation and fix upon him a different duty.[3] Thus where a bill of lading gave a ship leave to call at any port or ports, one of its usual ports being known to both parties to be under quarantine, a verbal agreement not to call there cannot be shown.[4]

In the recent English case of Ledue *v.* Ward, the plaintiffs shipped goods on defendant's vessel, the bill of lading stating that the goods were shipped for delivery at Dunkirk on board a vessel lying at Fiume and bound for Dunkirk, with liberty

[1] The Delaware, 14 Wall. 579; Long *v.* N. Y. C. R. R. Co., 50 N. Y. 76; O'Bryan *v.* Kinney, 74 Mo. 125; Germania Fire Ins. Co. *v.* M. & C. R. R. Co., 72 N.Y. 90; Germania Fire Ins. Co. *v.* M. & C. R. R. Co., 7 Hun (N.Y.), 233; White *v.* Ashton, 51 N. Y. 280; Hill *v.* S. B. & N. Y. R. R. Co., 73 N. Y. 351; O'Rourke *v.* Tons of Coal, 1 Fed. Rep. 623; The Lady Franklin, 8 Wall. 325; Giraudel *v.* Mendiburne, 3 Martin's La. Rep. N. S. 509; Ind. & Cin. R. R. Co. *v.* Remmy, 13 Ind. 518; Louisville & C. R. R. Co. *v.* Wilson, 119 Ind. 352; Cox *v.* Peterson, 30 Ala. 608; May *v.* Babcock, 4 Ohio, 334; Ricketts *v.* B. & O. R. R. Co., 61 Barbour (N. Y.), 18; Shaw *v.* Gardner, 12 Gray (78 Mass.), 488; Helliwell *v.* G. T. R. R. Co., 10 Bissell, 170; Arnold *v.* Jones, 26 Tex. 335; Security Bank of Minn. *v.* Luttgen, 29 Minn. 363.

[2] White *v.* Vankirk, 25 Barbour (N. Y.), 16; White *v.* Ashton, 51 N. Y. 280.

[3] Hinkley *v.* N. Y. C. & H. R. R. Co., 56 N. Y. 429.

[4] The Sidonian, 34 Fed. Rep. 805; S. C. 35 Fed. Rep. 534.

to call at any ports in any order. The ship, instead of proceeding direct to Dunkirk, sailed for Glasgow and was lost off the mouth of the Clyde. At the trial evidence was introduced to show that the shippers of the goods at the time when the bill of lading was given, knew that the vessel was intended to proceed to Glasgow. It was held that this evidence was not admissible to vary the terms of the bill of lading, which imported a voyage direct from Fiume to Dunkirk, subject to the liberty to call at any ports substantially within the course of such a voyage and that Glasgow was not one of the ports intended.[1]

§ 66. Where words are, however, omitted from the bill by mistake, the verbal agreement made before the bill was issued, is held not to have been merged in the bill. An illustration will be found in the following case: A shipper made an oral contract with the agent of a carrier to transport goods in a refrigerator car. The bill which was not received by the shipper until it was too late to remove the goods from the train, omitted the words, "refrigerator car through." When spoken to on the subject the agent said that the omission made no difference and that the car would go through all right. The goods were removed, during transit, to a box car and thus injured. Here the duty to carry in a refrigerator car through was imposed upon the carrier and his failure to so carry, rendered him liable.[2] In Hill *v.* Syracuse B. & N. Y. R. R. Co.,[3] the plaintiff delivered to the defendant, a quantity of wool in pursuance of a verbal contract by which it was to be shipped within two weeks. Afterwards, he received from defendant's agent receipts for the wool, but examined them at the time no farther than to see whether the facts were correctly stated. The next day he noticed conditions upon the receipts, one of which was, that the defendant should not be liable for any delay. The wool was not shipped for nearly two months and its market value greatly declined. It was held that the parol agreement was not merged in the receipts and that the plaintiff was entitled to damages.

[1] L. R. 20 Q. B. D. 475.

[2] Shiff *v.* N. Y. C. & H. R. R. Co., 16 Hun, 278.

[3] 8 Hun (N.Y.), 296; Hill *v.* S. B. & N. Y. R. R. Co., 73 N. Y. 351.

§ 67. In Bostwick *v.* B. & O. R. R. Co., goods were shipped under a verbal contract to be carried from Cincinnati to New York, "all rail." After parting with the goods the shipper was given a bill of lading of different import, limiting the carrier's liability and expressing on its face that by accepting it the shipper agreed to its conditions. It was here held that the prior parol agreement was not merged in the bill of lading and that if the shipper "had expressly assented to the terms of the bill of lading subsequently delivered to him, such assent would operate as a change of the terms of the contract originally made," but when the verbal contract had been acted upon, the mere receipt of the bill of lading and inadvertently omitting to examine the printed conditions, were not sufficient to conclude the shipper from showing what the actual agreement was under which the goods had been shipped.[1]

In Hamilton *v.* West N. C. R. R. Co.,[2] a carrier agreed to furnish cars for the transportation of cattle on a certain day, but failed to have them at the place specified. The cattle were subsequently shipped. The court held that the prior agreement was not merged in a bill of lading issued when the cattle were shipped. In Knox *v.* Ninetta,[3] grain was shipped on the Ninetta, on condition that no other cargo should be taken and that it should be carried directly to its destination without deviation. The master deviated and took an additional cargo of wood stowed on deck, whereby it was alleged that the grain was damaged. The court held that the agreement neither to deviate nor to take additional cargo could be proved and if it were established, the vessel was liable for the damage.

In Purcell *v.* Southern Express Co.,[4] where a receipt was given for goods exempting the carrier from liability, it was held not conclusive as to what the contract of carriage was and that proof might be introduced to show that the receipt did not contain the terms of the contract.

Where a bill of lading was signed by the consignor and not by the carrier it was held that though the instrument made the carrier liable as at common law, he could give evidence

[1] 45 N. Y. 712, reversing the judgment in 55 Barb. 137.

[2] 96 N. C. 398.

[3] Crabbe (U. S. D. C. Pa.), 534.

[4] 34 Georgia, 315.

of a parol contract by which the goods were to be carried at the owner's risk.[1]

§ 68. In Pennsylvania it has been held that where there is a bill of lading in the usual form and certain verbal arrangements are made at the time when the bill is given, both should be submitted to the jury from which to discover the contract[2] and in Maryland a carrier was allowed to prove that he stated in a conversation with the shippers, that he would take no risk; that the shipment was at the parties' own risk; that he would not insure the freight and that if they were not satisfied with the terms he would rather set the goods on the wharf.[3]

A bill of lading containing a modification of a verbal contract previously made by the parties and accepted by the shipper without noticing the change, does not supersede the prior verbal contract which may be proved by the shipper in an action against the carrier.[4] Where, however, the bill of lading is executed prior to a protest against a modification of the original parol contract, the parties are bound by it. Thus a carrier agreed to carry certain staves of a specified size for a fixed price per 1000. During his absence, as alleged, the shipper placed larger ones in the vessel so that he could carry only 66,110 staves instead of 90,000. He remonstrated and was assured that it would be made all right. He gave a bill of lading and protested against it after it was signed. The court held that if his allegations were true, he should not have signed the bill of lading, or if he did, should have protested against it at the time of signing it and upon his bringing an action on the contract as above signed, nonsuited him.[5]

While evidence of a different agreement by parol is not admissible to vary a bill of lading, yet the written contract may be avoided or modified by showing fraud in the execution of the bill.[6] Thus in a case of transportation on the Mississippi River the shipper agreed with the captain of the steamboat

[1] Gage *v.* Jaqueth, 1 Lansing (N. Y.), 207.

[2] Union R. R. & Trans. Co. *v.* Riegel, 23 P. F. Smith (Pa.), 72.

[3] Atwell *v.* Miller, 11 Md. 357.

[4] Mo. Pac. Ry. Co. *v.* Beeson, 30 Kan. 298.

[5] Rogers *v.* Roberts, 27 La. Ann. Rep. 85.

[6] Creery *v.* Holly, 14 Wendell (N. Y.), 26.

that if at any point of the trip (owing to lateness of the season) it should become impracticable or unsafe to proceed, he might store the goods and return and falsely stated to the captain that this agreement was contained in the bill of lading, whereupon the captain signed it, it was held that the said agreement entered into and became part of the written contract.[1]

§ 69. Though evidence is inadmissible to vary the terms of the bill of lading, yet parol testimony which tends to explain the terms of a contract that are ambiguous, or which will help to rectify a mistake, will be received.[2] So also, evidence of custom cannot be received to vary or contradict the terms of the contract where they are express or plain, but it will be admitted to add new terms as to which the writing is silent.[3]

It was held competent to give parol testimony to explain the meaning of the letters "C. O. D.," marked on the property shipped and its effect on the contract of carriage. Additional words, however, which are not technical, but ordinary and well defined in meaning, cannot be explained or varied.[4] It was held that parol testimony was admissible merely to explain a writing in a case where the owners of a steamboat contracted to carry 100 bales of cotton from a certain landing and the captain, finding 134 bales, took them all and the clerk gave an informal receipt for 134 bales, evidently not intended to embody the contract of carriage and containing no restrictions.[5]

In Savannah, etc., R. R. Co. *v.* Collins,[6] parol testimony was admitted to explain the words "Care R. R. Ag't, Callahan," at the end of a receipt given by a railroad company for certain merchandise delivered to it for transportation. In Balfour *v.* Wilkins[7] it was held that evidence of the facilities for loading at the port of lading was admissible to show in what sense the words "rainy days" were used in the bill of lading.

[1] West *v.* Steamboat Berlin, 3 Iowa, 532.

[2] The Delaware, 14 Wall. 579; McFadden *v.* Mo. Pac. Ry. Co., 92 Mo. 343; The Wanderer, 29 Fed. Rep. 260.

[3] C. & T. R. R. Co. *v.* Kidd, 29 Ala. 221; Blodgett *v.* Abbott, 40 N. W. Rep. 491.

[4] Collender *v.* Dinsmore, 55 N. Y. 200.

[5] Cooper *v.* Berry, 21 Georgia, 526.

[6] 3 S. E. Rep. 416.

[7] 5 Sawyer, C. C. 429.

§ 70. In Baltimore, etc., Co. *v.* Brown, it is said by Chief Justice Thompson that a bill of lading is not "such a complete contract as to exclude all testimony of what is not expressed and necessary to a complete contract. On its face it is but a memorandum and not in form a contract *inter partes.* It is doubtless an instrument fitted for the occasions in which it is usually employed and while what it clearly expresses may not be contradicted by oral testimony unless under the qualification of fraud or mistake, yet, there is no rule which excludes testimony to explain it and to show what the real contract was, of which it is but a note or memorandum."[1]

In the case of the "Star of Hope,"[2] where there was a written contract to stow certain goods under deck and a verbal agreement that the articles mentioned in the bill of lading should be put in the captain's cabin, it was held that such a supplementary agreement could be proved by parol, as it did not contradict the terms of the bill of lading and is a new and independent condition. It was further held that the libellants might recover on another ground, as the Court said that "it was evident from all the circumstances of the case, that the words 'in captain's cabin' were omitted by mistake."

It has even been held in the United States Circuit Court, that: "In construing a written contract Courts have the right to hear to a certain extent parol evidence as to the circumstances under which a contract was made for the purpose of putting themselves in the place of the contracting parties and determining the purport and effect of the language used."[3]

Where there is no ambiguity in the language of a contract, parol testimony will not be admitted. Thus in Krall *v.* Burnett,[4] the plaintiff shipped goods from London to Rouen, the freight being payable in London. The Court held that the defendant could not treat the word "freight" as an ambiguous

[1] Baltimore, etc., Stm. Boat Co. *v.* Brown, 4 P. F. Smith (Penna.), 77; see also Martin *v.* Cole, 104 U. S. 30; Mo. Pac. Ry. Co. *v.* Fagan, 9 S. W. Rep. 749; Doane *v.* Keating, 15 Leigh (Va.), 391; Brown *v.* Spofford, 95 U. S. 474.

[2] 2 Sawyer's Reps. 15.

[3] Myrick *v.* M. C. R. R. Co., 9 Bissel's Rep. 44; see also Morrison *v.* Davis, 20 Penn. 171; Hamilton *v.* W. N. C. R. R. Co., 96 N. C. 398.

[4] 25 W. R. 305.

term so as to give evidence of a custom to show that "freight payable in London" meant "freight payable in advance in London."

§ 71. The contract between the shipper and the carrier set forth in the bill must be gathered from the whole instrument,[1] giving, if possible, force and effect to every word made use of in order to determine the true intent of the parties.[2] Thus where the caption of a bill said, "through without transfer in cars owned and controlled by the company," the caption was held to be part of the instrument and to be considered in determining the effect of the contract.[3]

§ 72. On the other hand it has been held that while "marks" on packages may serve for an address, the copies of them in the bills of lading can serve no purpose but to identify the parcels. They cannot contradict the language used in the body of the bill. A carrier contracted to carry goods to "Nashville, Tenn., there to be delivered to J. E. Butler or order." Under the head of "Marks" in one of the bills issued were the words, "J. E. Butler, Atlanta, Ga." In two other bills the words "Atlanta, Ga." immediately followed the name of the consignee where it first occurred in the bills. It was held that the carrier was bound to carry to Nashville. The noting of the marks in the bill did not alter the plain language of the contract.[4]

Again, a marginal note put by the Quartermaster's Department of the United States on bills of lading of vessels chartered by them, "that if on the arrival of the vessel at the port of destination the consignee should order her to another place to discharge, such order in all cases to be in writing on the bill of lading," does not make a part of the contract entered into by the vessel and if her port of destination be plainly expressed

[1] Robinson *v.* Merch. Dis. Trans. Co., 45 Iowa, 470; Stewart *v.* Merch. Dis. Trans. Co., 47 Ibid. 229; Ashmore *v.* Penna. Stm. T. Trans. Co., 4 Duteher (N. Y.), 180; Lawrenee *v.* McGregor, Wright (Ohio), 193.

[2] Heineman *v.* G. T. R. R. Co., 31 How. Pr. (N. Y.) 430.

[3] Robinson *v.* Merch. Disp. Trans. Co., 45 Iowa, 470; Stewart *v.* Merch. Dis. Trans. Co., 47 Iowa, 229.

[4] Wheeler *v.* St. L. & S. R. R. Co., 3 Mo. Appeal Rep. 359.

in the body of the bill, the consignee cannot, in virtue of the marginal memorandum, order her to go forward to another port.[1]

§ 73. Not only must the whole of the bill of lading be looked to, but often it refers in terms to a charter party or other instrument as a completion of itself; *e. g.*, it may provide that goods are to be delivered "unto the order of the shippers or assigns, he or they paying freight for the said goods as per charter party." Then the provision in the latter, so referred to, becomes part of the bill of lading.[2]

In the case of Cobb *v.* Blanchard,[3] the defendants chartered a barque to the plaintiff for a voyage from a port of Sicily to Boston or New York, with the privilege of using a second port in Sicily with the laydays if required, "the master to sign bills of lading for any part of the cargo at any given rates of freight, if requested to do so without prejudice to this charter party," etc. The master having taken in one-third of a cargo at Licato and at the request of plaintiff's agent signed a bill of lading reciting that the vessel was bound for Boston, sailed at once without waiting for the expiration of the laydays or for a full cargo. Plaintiff had a cargo waiting at Palermo, though the master had not been so informed. In an action for damages for the loss of this cargo, it was held that the bill was not conclusive evidence of the voyage which the master was to pursue, as it would be if it were the only evidence of the contract of affreightment. A bill of lading is seldom used to fix the terms of the shipment as between shipper and owner when there is a formal charter party and here it was stipulated that bills of lading should be without prejudice to the charter party. Hence the bill is not conclusive evidence that the master was bound

[1] United States *v.* Kimball, 13 Wallace, 636.

[2] Certain Logs of Mahogany, 2 Sumner (U. S. C. C.), 589; see also Rodocanachi *v.* Milburn, L. R. 18 Q. B. D. 67; Cobb *v.* Blanchard, 11 Allen (93 Mass.), 409: Perkins *v.* Hill, 2 Woodbury & Minoto (U. S. C. C.), 158; Russell *v.* Nieman, 17 C. B. N. S. 163: Bags of Linseed, 1 Black. 108; Thorman *v.* Burt, 54 L. T. N. S. 349; Lishman *v.* Christie, L. R. 19 Q. B. D. 333; Paterson *v.* Dakin, 31 Fed. Rep. 682; The Karo, 29 Fed. Rep. 652.

[3] 11 Allen (93 Mass.), 409; see also Ardan Steamship Co. *v.* Theband, 35 Fed. Rep. 620.

to sail at once directly for Boston or that he exercised good faith in doing so.

A bark was chartered for a voyage from Baltimore "to a safe, direct, Norwegian or Danish port, as ordered on signing bills of lading, or as near thereunto as she can safely get and always lay and discharge afloat." The vessel was loaded and bills of lading were tendered to the master for signature, ordering the bark to the port of Aalborg, in Denmark. The master refused to sign the bills of lading on the ground that Aalborg was not a safe port. The evidence showed that Aalborg was in an inlet, having a bar across its mouth, which it was impossible for the bark to pass, either in ballast or with cargo and that there was no reasonably safe anchorage outside. The court held that the captain was justified in refusing to sign the bills of lading.[1]

§ 74. It has been held, however, that though a charter party contained other exceptions than that mentioned in the bill of lading ["dangers of Sea"], the master was the agent of the owner as well as the charterer and, therefore, the terms of the bill of lading were binding.[2]

In the case of the Bark "Carlotta,"[3] it was held that where the owner of a vessel, notwithstanding the charter-party, enters into a special contract through the master in respect to the carriage and delivery of the goods, the bills of lading must be regarded as the contracts by which the rights of the parties are to be governed, so far as respects the matters provided therein.

In Gullischein *v.* Stewart Brothers, a charter-party contained the usual stipulations for freight, demurrage and a cesser clause. The charterers placed the cargo on board at the port of loading and a bill of lading was signed, making the goods deliverable to themselves at the port of discharge, "they paying freight and all other conditions as per charter." The ship owners brought an action against the charterers as consignees under the bill of lading, for demurrage at the port of discharge. The court held that the charterers were liable because the bill

[1] The Gazelle, 128 U. S. 474.

[2] The Patria, 41 L. J. Adm. 23. (Ct. of Adm.)

[3] 9 Benedict, 1.

of lading only incorporated such clauses of the charter as were consistent with its character as a bill of lading. The cesser clause was held not to be incorporated.[1]

§ 75. Where there are written and printed clauses in a bill which are at variance with each other, the written portions must prevail. Only so much of the printed matter in the blank form as is consistent therewith, is of any effect. All the rest must be rejected.[2] A case in point is where A. shipped goods taking a bill of lading for them in which a certain valuation (in reality below the value of the goods) was written whereby the goods were agreed to be carried at a reduced rate. The bill also contained a printed clause that in case of loss the value of the goods at the place of shipment should be taken. The goods were lost and A. was held to be bound by the statement of value written in the bill of lading,—the reduced freight being an ample consideration for the low valuation put upon the goods.[3]

§ 76. A plaintiff delivered to carriers a closed case containing silk broad-stuffs. The bill of lading described the contents as linen goods. Before signing, the captain of the ship stamped on the bill the words "weight, value and contents unknown." The representation that the goods were linen was inadvertent and two pieces of silk were found to be abstracted on the delivery of the case. In an action for the value of the two pieces it was held that the effect of the words stamped was to completely do away with the description of the goods as linen and the carrier was bound to carry the goods whatever they were. The action was accordingly sustained.[4]

In the case of the Andover a libel was filed against the ship

[1] L. R., 13 Q. B. D. 317; see also The San Roman, L. R. 3 Adm. 583; Kern *v.* Deslandes, 10 C. B. N. S. 205; Gledstanes *v.* Allen, 12 C. B. 202; Gardner *v.* Trechmann, L. R. 15 Q. B. D. 154; Porteus *v.* Watney, L. R. 3 Q. B. D. 534; Bryden *v.* Niebuhr, 1 C. & E. 241; Gray *v.* Carr, L. R. 6 Q. B. 522.

[2] Babcock *v.* L. S. & M. S. R. R. Co., 49 N. Y. 491; Miller *v.* H. & St. J. R. R. Co., 24 Hun. (N. Y.), 607; Elkins *v.* Empire Trans. Co., 2 W. N. C. 403; The Brig. Sloga, 10 Benedick (U. S. D. C. N. Y.), 315.

[3] Elkins *v.* Empire Trans. Co., 2 W. N. C. 403 (Supreme Ct. Penna.).

[4] Lebeau *v.* Gen. Stm. Nav. Co., 42 S. J. C. P. 1; 8 L. R. C. P. 88.

to recover the value of ten bales of cotton. The cotton in question was part of a cargo shipped and consigned to the libellant,—he paying the freight. The bill of lading contained the clause, "contents and weight unknown." The freight was to be paid at a certain rate per pound and in the margin of the bill certain figures were placed, apparently as the aggregate weight of the cotton. On the arrival of the ship the consignees of the ship claimed that the figures in the margin of the bill of lading should govern in determining the weight, while the libellant insisted that as the bill of lading said "weight unknown," the cotton should be weighed and freight be paid accordingly. He offered to pay the freight on these terms. The ten bales in question were retained under the ship's lien for freight. The court said: "There is nothing in the bill of lading indicating that the weight was agreed on between the master and the shipper, but the contrary. For notwithstanding the memorandum in the margin as the supposed or real weight of the cotton, the master as is apparent, required the insertion at the foot of the bill, before he signed it, of the words "contents and weight unknown," thereby excluding any inference that the owner was to be bound by the memorandum." A decree for the libellant for the value of the cotton, less the freight, was affirmed.

§ 77. A bill of lading like any other contract is to be construed according to the intent of the parties.[1] Where it is specified that goods are to be carried from one point to another, a direct voyage is *prima facie* intended, but this may be controlled by usage or the personal knowledge of the shipper.[2] In the case of Adams Express Company *v.* Boskowitz,[3] an action was instituted to recover damages for the loss of certain furs and the defence was based on the ground that the shipper's clerk fraudulently concealed the value of several packages. Here a blank receipt of U. S. Express Company

[1] Nicholas *v.* N. Y. C. & H. R. R. R. Co., 89 N. Y. 370; Heineman *v.* G. T. R. R. Co., 31 How. Pr. (N. Y.) 430; Lowry *v.* Russell, 8 Pick. (25 Mass.) 360; Adams Ex. Co. *v.* Boskowitz, 107 Ill. 660.

[2] Lowry *v.* Russell, 8 Pickering (25 Mass.), 360.

[3] 107 Ill. 660.

was used with the word "Adams" written over "United States" in the heading, but not in the body and the latter express company was in no sense a party to the contract. It was held that the true intent of the parties must be determined from circumstances to be proved *dehors* the receipt.

58

CHAPTER VI.

FURTHER RULES FOR CONSTRUING THE CONTRACT.

The bill construed with reference to usage and custom, §§ 78, 79, 80.
Limitations of the rule, § 81.
Terms varied by custom or technical meaning, § 82.
Usage as to course of voyage, § 83.
Usage in conflict with positive law, § 84.
The bill construed with reference to custom as to stowage, §§ 85, 86.
The case of Lamb *v.* Parkman, § 87.
Custom as to stowage continued, § 88.

§ 78. It may be laid down as a general rule that bills of lading are not to be strictly construed.[1] As contracts they may not be varied by parol, but evidence of usage or custom is admissible to aid in their interpretation. This is received in order that the Court may ascertain the sense and understanding of the parties to the contracts, which are made with reference to such usage or custom.[2] The custom is, in fact, a part of the contract and may be properly considered as the law of the contract resting on the same principle as the doctrine of the *lex loci*.[3]

Though a bill of lading is, generally speaking, to be construed according to the terms expressed in it, yet to adopt the words of Mr. Justice Wright, "If there is a common usage of the trade affecting the question, that usage will be regarded as within the contemplation of the contracting parties and a compliance with the contract as modified by such usage, will satisfy the stipulations of the contract. But a usage to affect the contract, must be common and general; not fluctuating or dependent upon price, or other such circumstance. If a carrier would reserve to himself the right to vary from a contract of lading drawn in the usual form or avail himself of the privilege

[1] Jones *v.* Hoyt, 23 Conn. 157.
[2] May *v.* Babcock, 4 Ohio, 334.
[3] Sampson *v.* Lindsay, 6 Porter (Ala.), 123.

of change, he must stipulate for the leave and vary the bill of lading so as to meet the stipulation."[1]

§ 79. The case of Blossom *v.* Griffin decided that in construing a written instrument the Court may look to antecedent and attending facts and circumstances to ascertain its meaning.[2] Thus where it is shown to be a usual custom for a carrier to give a receipt for goods over night and a bill of lading in the morning, goods so taken are to be considered as taken under the usual form of the carrier's bill of lading and the latter relates back to the receipt of the goods.[3]

In a Louisiana case[4] where calves, having been shipped on a steamboat, were in the course of the journey put on shore to lighten the boat, wandered off, no care being taken of them and the defence set up a custom that it was not usual for boats to give bills of lading for this kind of freight and that the carrier was not responsible for the lives of stock shipped, the Court saw nothing in the defence to excuse the carrier, since, even if it were available as a defence, no knowledge of any such usage by the other party was shown. It has been also held that a custom to lighten cotton over shoals in the Tennessee River when the water is low and charge the lighterage to the owner of the goods, is reasonable, beneficial to the consignor and binding on him. The contract in the bill of lading is presumed to have been made with reference to the custom.[5]

A bill of lading which says, "The property is to be delivered in like good order and condition at the port of New York, dangers of the seas (land carriage and river navigation, thieves and robbers) excepted," disposes by its own terms of all customs and practices and there is no room for proof of them for the purpose of modifying the contract.[6]

§ 80. In Adams Express Co. *v.* Boskowitz,[7] there was a conflict of evidence as to whether a memorandum of the nature and weight of certain furs was put on a receipt before or after it was

[1] Lawrence *v.* McGregor, Wright (Ohio), 193.

[2] 13 N. Y. 569.

[3] Patterson *v.* Clyde, 17 P. F. Smith (Pa.), 500.

[4] Pitre *v.* Offut, 21 La. Ann. Rep. 679.

[5] Andrews *v.* Roach, 3 Ala. 590.

[6] Simmons *v.* Law, 3 Keyes (40 N. Y.), 217.

[7] 107 Ill. 660.

signed. A question was put to the agent of the common carrier whether it was customary according to his observation for plaintiffs to put their weights on the receipts. The Court held that the question was proper. Again, in the Canadian case of Gibbon *v.* Michael's Bay Lumber Company,[1] a question arose as to whether Sunday was to be reckoned as one of the days to be allowed for, in computing demurrage provided for in a charter party. The Court held that "days" mean the same as running days, or consecutive days, unless there be some particular custom or usage to the contrary.

The contract by which a common carrier limits his liability may be express or implied and usage may be resorted to, to prove that such a contract is to be implied.[2]

§ 81. Mere usage cannot absolve a common carrier from his ordinary duties to which he is bound by public policy, by his general undertaking or by his special promise.[3] Thus the owners of a steamboat are liable as common carriers for a loss of goods by robbery. Where a boat on the Tombigbee River was boarded and seized by a body of armed men and certain cotton taken which had been shipped under a bill of lading which as usual excepted "dangers of the river," it was held that evidence could not be received of a custom exempting the owners from loss by such seizure as that in this case. Custom cannot be allowed to vary the plain terms of the contract.[4]

There is nothing in the language of bills of lading excepting "perils of navigation and perils of the sea," which makes the owner of the ship liable for the negligence of his servants in case of loss by fire, when the Act of Congress of 3d March, 1851 (9 Stat. at Large, 635), which applies to express contracts and to lake as well as ocean trade, expressly declares the shipowner free from such responsibility. Usage cannot add to words which do not express it, a liability from which the Act

[1] 7 Ontario, 746.

[2] Cooper *v.* Berry, 21 Ga. 526.

[3] P. C. & St. L. R. R. Co. *v.* Barrett, 36 Ohio State, 448; Turney *v.* Wilson, 7 Yerger (Tenn.), 340; Exchange Shipping Co. *v.* Dixon, L. R. 12 App Cases, 11; 56 L. J. Q. B. 266; 35 W. R. 461.

[4] Boone *v.* Strubt Belfast, 40 Ala. 184; overruling Steele *v.* McTyer's Adm'rs, 31 Ala. 667.

of Congress declares the ship-owner to be free. Such usage is not to be attached to words in a contract which have no such meaning of themselves.[1]

§ 82. Terms used in the bill which by custom have acquired a technical meaning will be taken in that sense.[2] Thus if the language of a bill of lading be deemed insufficient to determine the meaning of the words "quantity guaranteed" used therein, they may be regarded as a technical expression known and understood by persons in the business and evidence from such a person is proper to explain it.[3]

Where a carrier receipted for certain marble slabs as "unwrought marble," it was held that the words "wrought" and "unwrought" were of doubtful signification and it was competent for the owner to show the meaning given to them by custom and usage and that such custom, in order to bind the carrier need not be universal, settled or uniform, among dealers and carriers.[4]

§ 83. In a bill of lading a direct voyage is *prima facie* intended, but a custom of stopping at intermediate points, or an agreement of the parties so to do, may show the intention to have been otherwise.[5] In Wright *v.* Holcombe, the plaintiff shipped flour in defendant's vessel which stopped at various places out of her direct course to complete her cargo. The vessel was wrecked while out of her course. The bill of lading contained the usual exceptions as to act of God, the Queen's enemies, fire and dangers and accidents of navigation. The Court held that the deviation not appearing to be in the usual course of trade, the defendant was liable for the value of the flour. Chief Justice DRAPER, in delivering the opinion, said: "Looking at the bill of lading and considering its terms only, the presumption would be that a direct voyage was intended. If it were shown that there was a usage to stop at intermediate places, or if personal knowledge could be brought home to the shipper that

[1] Walker *v.* Transp. Co., 3 Wallace, 150.

[2] Wayne *v.* Stm. Pike, 16 Ohio, 421.

[3] Bissell *v.* Campbell, 54 N. Y. 353.

[4] Bancroft *v.* Peters, 4 Mich. 619.

[5] Lowrey *v.* Russell, 8 Pick. (Mass.), 360; Cobb *v.* Blanchard, 11 Allen, 409.

stopping at intermediate places must have been intended in order to complete the loading of the vessel, then the presumption arising from the language of the bill of lading would be qualified. The existence of such a voyage, or of such knowledge, are matters of fact to be determined by the jury. The parties have desired and agreed that the Court shall decide this case on the evidence. . . . . The evidence of usage was not of that character to warrant the legal inference that the direct contract is controlled by it."[1]

§ 84. A usage of trade in conflict with positive law will not be sustained. Thus a usage of trade that a valid contract for carriage may be thrown up at the convenience of either party is not good.[2] A consignee or an indorsee of a bill of lading has no right to have the value of missing goods deducted from the freight payable in respect of the goods delivered. This being the general law, it cannot be altered by a universal practice of merchants which is not confined to any particular place or trade to have the value of such goods deducted from the freight. There can be no such custom inconsistent with the law.[3]

§ 85. A clean bill imports that the goods are to be stowed under deck and parol evidence to vary such a bill is, as a general rule, inadmissible. Even in an action by the vendor against the purchaser for the price of the goods which were lost in consequence of the stowage on deck by the carrier, it was held that parol proof that the vendor agreed that the goods should be so stowed could not be received.[4] Testimony to prove a verbal agreement that the goods might be stowed on deck was rejected in the case of Barber *v.* Brace,[5] on the ground that the whole conversation before and at the time the writing was given was merged in the written instrument.[6] Where it appeared that the shipper or his agent who delivered the goods to the carrier repeatedly saw them as they were stowed in

[1] Wright *v.* Holcombe, 6 U. C. C. P. Rep. 531.

[2] Randall *v.* Smith, 63 Me. 105.

[3] Meyer *v.* Dresser, 33 L. J. C. P. 289; 12 W. R. 983; 10 L. T. N. S. 612; 16 C. B. N. S. 646.

[4] Creery *v.* Holly, 14 Wendell, 28; Star of Hope, 2 Sawyer, 15.

[5] 3 Conn. 9.

[6] See also The Wellington, 1 Bissell, 279.

that way and made no objection, it has been held, that the evidence of these facts was not admissible to vary the legal import of the contract of shipment. The bill, being what is called a clean bill, bound the carrier to transport the goods under deck.[1]

Where the bill stipulated that goods were to be carried on deck, parol proof was held inadmissible to affect the stipulation.[2] Clear extrinsic proof that the bill was signed by mistake and that the actual agreement was that the goods should be taken and stowed on deck, is admissible. It would be but a mistake committed in reducing an agreement to writing, a mistake from which a court of equity would relieve.[3]

§ 86. Suit was brought for damages for non-delivery of cotton in good order, as stipulated by the bills of lading and the defendants answered that it was the custom of carriers to transport goods in open vehicles and boats exposed to the weather, that such custom was known to and acquiesced in by the shippers in the case in question and that the cotton suffered solely from rain falling upon it during the conveyance. It was held that the exemption from liability, claimed by defendants, seemed well founded in reason and a necessary result of the circumstances.[4] In the case of "The Delaware,"[5] it was held that shipowners are bound to have goods safely secured under deck, unless they are authorized to carry on deck by the usage of a particular trade or the assent of the shipper. Mr. Justice CLIFFORD, said, *inter alia*, that, "Testimony to prove a verbal agreement that the goods might be stowed on deck was offered by the defence in the case of Barber *v.* Brace, but the court rejected the testimony, holding that the whole conversation, both before and at the time the writing was given, was merged in the written instrument, which undoubtedly is the correct rule upon the subject."

In an action for the loss of certain lumber shipped from Gardiner, Me., to Boston, Mass., under a "clean" bill of lading

[1] Sproat *v.* Donnell, 26 Me. 187.

[2] Sayward *v.* Stevens, 3 Gray (69 Mass.), 97.

[3] Doane *v.* Keating, 12 Leigh (Va.), 391.

[4] Chevallier's Adm'r *v.* Patton, 10 Texas, 344.

[5] The Delaware, 14 Wallace, 579.

and stowed on deck, it was held that the bill was affected by the custom of stowing such cargoes as convenience required, either below or upon deck and that no liability attached to the carrier,—no negligence having been shown.[1]

§ 87. In the case of Lamb *v.* Parkman[2] a libel in admiralty was filed by the owner of the vessel to recover a balance of freight on a charter-party. The contract was in the usual form and contained the clause, "dangers of the seas, fire and navigation excepted." The respondent claimed a set-off for a loss occasioned by an alleged improper stowage of the cargo and injury to it from steam. Mr. Justice SPRAGUE, in entering a decree for the libellant, said: "It appears by the evidence that three-fourths, at least, of all the merchandise imported into the United States from Calcutta are brought into the port of Boston and that almost all the cargoes are more or less affected by this steam damage, as it is called. . . . It has not been shown, that the amount of injury in the present case is unusual. . . . . After a careful consideration of all the evidence I think that it clearly proves a usage to stow cargoes in the Calcutta trade, consisting of the same kind of goods as this, in the same manner as this cargo and these goods were stowed. It was further clearly proved, that this kind of damage had always been borne by the shipper and never by the ship-owner. There is no controversy that the parties may make a contract for any mode of stowage which they may see fit. What contract have they made in this respect? In the absence of expressed stipulations the usage of the trade answers this question. To that usage the contract tacitly refers, not to contradict or vary its terms, but for expounding its meaning and supplying details in the mode of its execution. But it is insisted that, under such a charter-party, it is the practice for masters to give a bill of lading at Calcutta, in the usual form and that, as this was done in the present case, the owners thereby became insurers against all losses not coming within the express or implied exceptions. Without pausing to inquire what would be the rights of an assignee, I apprehend that, as between the original parties, the bill of lading must be deemed a receipt

[1] Sproat *v.* Donnell, 26 Me. 185.

[2] 1 Sprague, 343.

or acknowledgment of the goods taken on board, without varying the obligations of the charter-party. But suppose that by virtue of this usage, the bill of lading is imported into the original contract, is not the usage for the shipper always to bear this steam damage also imported into the contract? If usage creates liabilities by giving a bill of lading, does not usage also limit those liabilities to the exclusion of the present claim? But independently of this view, what are the liabilities of the carrier, under the bill of lading? By the express exceptions, he is not responsible for loss or injury arising from the perils of the sea or navigation and the law also exempts him from liability for damage or deterioration arising from the nature of the article and its confinement in the hold during the voyage."

§ 88. It was the opinion of Mr. Justice RANDALL, in Knox *v.* The Miretta,[1] where the usage to carry wood on deck had been urged as a sufficient defence, that a usage or custom, if proved, cannot be suffered to vary the positive stipulations of a contract. The usage may always be waived at the will of the parties. Again, in another case, where it was contended that the goods were carried on deck with the consent of the shipper, it was held that: "It did not so appear in the bill of lading, which was what is called a clean bill, *i. e.*, it was silent as to the mode of stowing the goods and contained no exception to the master's liability, but the usual one of the dangers of the sea. . . . . A bill of lading therefore imports, unless the contrary appear on its face, that the goods are to be safely secured under deck."[2]

In an action for the loss of certain whiskey carried on deck and washed overboard, it was held that owners of vessels are responsible in any event for the loss of goods stowed on deck, unless such stowage is authorized by the consent of the shipper or by custom.[3]

[1] Crabbe's Reps., p. 534.

[2] The Waldo, 2 Waré's Reps., 165.

[3] Dorsey *v.* Smith, 4 La. 211.

CHAPTER VII.

CONFLICT OF LAWS IN CONSTRUING THE BILL OF LADING.

The general rule as to the law that governs construction, § 89.
Consideration of the cases, §§ 90, 91.
The Iowa authorities, § 92.
Decisions in other states, §§ 93, 94.
Decisions in England, § 95.
Decision by U. S. Supreme Court, § 96.
"The law of the ship," § 97.
Divergent opinions, § 98.
"The law of the court," § 99.

§ 89. Bills of lading are frequently given by carriers in one state or country for goods to be transported thence and delivered in another. The law of the several States or countries in or through which the transportation is to be made, may differ in respect to the validity of the contract, the interpretation of its terms, the manner of its performance and the obligation of the parties under it.

When a loss or breach occurs the questions arise: By what law is the contract to be governed? By the law of the place where the contract is made (*lex loci contractus*) or by the law of the place where it is to be performed (*lex loci solutionis*)? The answers to these questions are important and are not without serious difficulty. Many and learned authors have discussed the subject in regard to contracts generally and have arrived at different conclusions.[1]

It is believed, however, that the decisions will bear out the following general statement in regard to bills of lading, namely, bills of lading and other contracts for carriage with respect to their validity and interpretation are to be governed and construed by *lex loci contractus*, and with respect to the mode of performance by *lex loci solutionis*, unless a contrary intention of the parties is manifest from the instrument or from the character of the transaction. The decisions of the courts are discordant unless harmonized by this distinction. Thus, in Pennsylvania,

[1] See Wharton on Conf. of Laws, § 401.

two cases decided a year apart, apparently irreconcilable, are made consistent. In Henry *v.* Philadelphia Warehouse Co.[1] (decided in 1876) Henry, a resident of Philadelphia, bought cotton in New Orleans through a broker. He personally paid the sellers and gave the broker an order on the sellers for the cotton. The broker took out a bill of lading in his own name for the shipment to Philadelphia, made a draft on Henry for the price, sold the draft and indorsed the bill of lading to the purchaser as security for the draft. By the law of Louisiana bills of lading are negotiable by indorsement. It was held that the broker's indorsement of the bill passed the title to the cotton to the purchaser of the draft and that the transaction must be governed by the law of Louisiana. In Brown *v.* Camden and Atlantic Railroad Co.[2] (decided in 1877) the facts were as follows: B. bought a ticket from the railroad, a New Jersey corporation, and delivered his trunk to the company at Philadelphia, to be taken to a point in New Jersey. The trunk was lost, but it did not appear where the loss occurred. By an Act of Assembly of Pennsylvania, railroads are freed from liability for loss to baggage beyond $300, unless the value is declared. Here it was held that the carrier could not have the benefit of the Act and that the case was governed by the law of New Jersey. Mr. Justice SHARSWOOD said: "It is perfectly well settled by a host of authorities, which it would be an affectation of learning to cite, that it is the law of the place of performance by which the mode of fulfilling a contract and the measure of liability for its breach must be determined."

§ 90. The distinction stated will, it is believed, be found to run through all the following decisions. It may not be distinctly marked in the opinion, but a careful examination of the cases will generally serve to bring each on one side or the other of the line of demarkation already drawn.

In the First National Bank of Toledo *v.* Shaw,[3] a bill of lading was executed in Ohio for merchandise there shipped to be transported to a place in the State of New York. The bill was delivered pursuant to a contract made in and by residents

[1] 81 Penna. St. 76.
[2] 83 ib. 316.
[3] 61 N. Y. 283.

of Ohio, to one there making advances upon the faith thereof and to secure drafts drawn for such advances on parties in the State of New York. This was held to be an Ohio contract, to be construed by and under the laws and commercial usages of that State. The court, in the course of the opinion, said: "In the more general case where a contract is made in one country and to be performed in another, it is not always easy to determine according to the authorities, whether the interpretation of the words is to be governed by the law of the place where the contract is made or by that where it is to be performed. The general principle is, that the law of the place where the contract is made is to govern, unless it is positively to be performed elsewhere. The fact that acts are to be done abroad under a contract, does not necessarily make it a contract to be performed there, in a legal sense. Thus, it has been said that a policy of insurance executed in England on a French ship for a French owner, on a voyage from one French port to another, is to be interpreted as an English contract.[1] The true inquiry is, what was the intent of the parties? It would seem that in a case like the present, where the contract was made in Ohio, by Toledo parties, the money being advanced there and the security there, that they had in view, in employing words, their own usages, even though the goods were to be sent to another State and ultimately sold there if the advances were not repaid."

§ 91. In Dyke *v.* Erie Railway,[2] a suit brought for damages for injuries, by a passenger, a statement of the law is made by Mr. Justice ALLEN to the effect that the generally received rule for the interpretation of contracts, is that they are to be construed and interpreted according to the laws of the State in which they are made unless from their terms, it is perceived that they were entered into with a view to the laws of some other State. "The *lex loci contractus*," he continues, "determines the nature, validity, obligation and legal effect of the contract and gives the rule of construction and interpretation, unless it appears to have been made with reference to the laws

[1] Don *v.* Lippman, 5 Cl. & F. 1. [2] 45 N. Y. 113.

and usages of some other State or government, as when it is to be performed in another place and then in conformity to the presumed intention of the parties, the law of the place of performance furnishes the rule."

Where goods were shipped under a contract made at Boston and the bill of lading, containing an exception of fire, was not delivered to the consignor till the goods were *in transitu*, and they were destroyed in the great Chicago fire, it was held that the *lex loci contractus*, *i. e.*, the law of Massachusetts, governed the case, which law requires the bill to be taken without dissent by the consignor at the time of shipment, in order to make it binding upon him.[1] It is held in Illinois to be "an established principle, with respect to personal contracts, that the law of the place where they are made shall govern in their construction, except when made with a view to performance in some other State or country,"[2] and in an Iowa case where the contract of shipment had been made by the consignors on behalf of the consignees, in Massachusetts, it was held that if the contract was valid in the State where made, it would bind a consignee residing in another State.[3]

§ 92. The laws of Iowa forbid any contract limiting the common law liability of a carrier. A contract, made in that State for the transportation of cattle to Chicago, contained an exception of fire. It was held that a contract void or illegal where it is made is so everywhere. Hence, it would not help the carrier if the contract were to be entirely performed in Illinois. This contract was, however, to be partly performed in Iowa and was entire and indivisible. Hence, the carrier was fully liable as at common law.[4] In a later case in the State of Iowa the following facts appeared: Goods were shipped at Hartford, Connecticut, for Des Moines, Iowa and were destroyed *en route* by fire in Chicago, Illinois. The contract of carriage exempted the carrier from loss by fire. Such a contract was legal in Connecticut but not

[1] M. C. R. R. Co. *v.* Boyd, 91 Ill. 268.

[2] M. & St. P. R. R. Co. *v.* Smith, 74 ib. 197; The Pennsylvania Co. *v.* Fairchild, 69 ib. 260.

[3] Robinson *v.* M. D. T. Co., 45 Iowa, 470.

[4] McDaniel *v.* C. & N. W. Rl'y Co., 24 ib. 412.

in Iowa where any restriction of the common law liability by contract was forbidden by chapter 113 of the laws of 1866. It was held in an action for damages for the loss that the contract was a valid one; that the plaintiff could not recover and that where there are several possible local laws applicable to the case, that law is to be applied which is most favorable to the contract.[1] This case would seem to be a divergence from the track of other decisions, but the learned judge in alluding to the case of McDaniels *v.* The C. & N. W. R. R. Co., says in his opinion: "Applying the rule of that case to this, it seems necessarily to follow, that since this contract was made in Connecticut and was there to be partly performed, its validity and effect should be determined by the law of that State. But without determining that such a rule should be applied to its full extent to every contract or even to this, we here ground our decision of this cause upon the special facts of the case which show that the contract as made was valid in Connecticut, where the contract was made and in Illinois where the loss occurred. Whether a different rule would apply if the defendants had entered upon the performance of their contract in Iowa and the loss had there occurred, we need not determine."[2]

§ 93. A contract was made in Iowa for the sale of intoxicating liquor. The liquor was delivered in Wisconsin to a carrier for the vendee. In an action for the price, the defence was that the contract was void under the Iowa statute prohibiting the sale of intoxicating liquors and under the Wisconsin statute of frauds for want of a writing. The plaintiffs replied that the contract was executed in Wisconsin and ratified by the vendee's acceptance through the carrier of the goods delivered to it. The carrier had been designated at the time of the contract by the parties. It was held that delivery to the carrier designated by the purchaser might have been an acceptance of the goods in the State of Wisconsin and an execution of the contract there, if the contract had not been void by the

[1] Talbott *v.* Merchants' Desp. Trans. Co., 41 Iowa, 247.

[2] See Arnold *v.* Potter, 22 ib. 194, where the *lex loci contractus* was held applicable in a case of alleged usurious interest where the rate of interest differed in the two States.

statute of frauds. Such a delivery under a void contract, however, does not take it out of the statute.[1]

Goods were shipped at Bethany, Georgia, under a contract for limited liability, to Chicago, Illinois, and were stolen after their arrival. A statute of Illinois prohibited common carriers from limiting their common law liability. In a suit for damages for the loss of the goods brought in the Circuit Court of the United States, it was held that the statute did not apply as, though the route of the carrier to whom the goods were first delivered ended at Cairo, Illinois from whence the goods were shipped to destination by the defendant carrier, yet the contract was made in Georgia where limitations of liability are legal.[2] The liability of a common carrier who undertakes in Mexico to convey goods from the territory of that government into Texas, is to be determined according to the laws of Mexico which excuses a carrier if the loss is caused by superior force. Where, however, the property was contraband of war and was taken from the carrier by Confederate soldiers, it was held that owing to the unlawful nature of the transaction the contract could not be enforced.[3] In an Alabama case it was said by the court in an action on a contract which was entered into and to be performed wholly in another State, that it will be presumed, in the absence of proof to the contrary, that the common law as to carriers prevails in that other State.[4]

§ 94. In Gray *v.* Jackson,[5] a carrier in New Hampshire received goods marked for delivery beyond his route in Massachusetts. He carried them to his terminus and there delivered them to the connecting carrier by whom they were lost. In his opinion Mr. Justice Doe says: "The authorities on a carrier's liability beyond his own route seem not generally to put it upon the law of the State in which his contract is to be performed. Neither do they expressly make an exception to take

[1] Keiwert *v.* Meyer, 62 Ind. 587.

[2] Mather *v.* American Ex. Co., 2 Federal Reporter, 49; see also Mynard *v.* R. R. Co., 71 N. Y. 180.

[3] Cantu *v.* Bennett, 39 Tex. 303.

[4] S. W. R. R. Co. *v.* Webb, 48 Ala. 585.

[5] Gray *v.* Jackson, 51 N. H. 39; see also Faulkner *v.* Hast, 82 N. Y. 413.

this class of cases out of the general rule that the construction and force of a contract are governed by the law of the State in which it is to be executed. If the part of the defendant's contract which was to be performed in Massachusetts, is governed by the law of Massachusetts, the decisions of that State furnish no ground for granting a new trial in this case."

In Barter *v.* Wheeler,[1] in the same State, it has been held that when a contract is made in one State to transport goods over a line extending through two or more States and the goods are lost by an intermediate carrier, the obligation of this carrier under the contract upon his portion of the route, shall be governed by the law of the State in which his part of the contract is performed.

§ 95. The diversity of opinion and the unsettled condition of the law of England on this subject is well shown in the case of Cohen *v.* South Eastern Railway Co., decided in 1877.[2] The plaintiff's wife was a passenger who took a ticket at Boulogne to travel from that place to London *via* Folkestone by the South Eastern Company's steamer from Boulogne to Folkestone and by their railway from Folkestone to London. There was a provision on the ticket which excluded the liability of the company for the loss of passengers' luggage, if the value thereof exceeded a certain sum. This lady's box, by the carelessness of the company's servants, was dropped into Folkestone harbor and the contents were greatly damaged. The first question that arose was, by what law the case was to be governed, the law of England or that of France? Opinions were filed by three justices, MELLISH, L. J., BAGGALAY, J. A., and BRETT, J. A. In the course of their opinions each recognized the importance and difficulty of the question and refrained from deciding it, but each expressed his personal opinion. The first and last named inclined to the belief that the contract should be governed by the law of England. BAGGALAY, J.,

[1] 49 N. H. 29. A careful examination of this case discloses the fact that the reporter has misconstrued the opinion of the court, and is not correct in stating in the syllabus that "the rights of the parties will be governed generally by the laws of the state where the loss happens."

[2] 2 L. R. Exch. Div. 253.

however, thought that it properly should be regarded, at least in part, as a French contract.[1]

In Meyer *v.* Dresser,[2] it was held that the law of a foreign country entitling the consignee to reduce the claim against him for freight by the value of goods put on board and lost, but which amounted to an allowance by way of set-off and not to an extinguishment of the claim for freight, was matter of procedure only and therefore did not apply to an action for freight brought in England against the consignee. In Moore *v.* Harris,[3] a bill of lading made in England by the master of an English ship stipulated, that packages of tea were "to be delivered from the ship's deck, where the ship's responsibility shall cease, at the port of Montreal unto the Grand Trunk Railway Co., ... to be forwarded thence . . . . to Toronto and . . . . delivered to the consignees or to their assigns." Among other conditions was the following: "No damage that can be insured against will be paid for, nor will any claim whatever be admitted unless made before the goods are removed." The tea was landed, placed in certain shipping sheds, thence removed to railway freight sheds and finally delivered to consignees at Toronto. No notice was given of damage until thirteen days after the delivery was completed. The tea was found impregnated with the smell of chloride of lime and carbolic acid. The court held that the bill of lading was governed by English law and that the consideration as to the time of making claim for damages was binding on the consignees.

§ 96. In Liverpool & Great Western Steam Company *v.* Phœnix Ins. Co.,[4] it was held that a bill of lading made in an American port by an American shipper, with the owners of a ship who were English, for the shipment of goods to England, where the freight was payable in English currency, was an American contract and governed by American law, so far as regarded the effect of a stipulation exempting the company from responsi-

[1] See also The Patria, 3 L. R. Adm. Div. 436, where the law affecting bills of lading is discussed, but not decided.

[2] 33 L. J. C. P. 289; 12 W. R. 983; 10 L. T. N. S. 612; 16 C. B. N. S. 646.

[3] 1 L. R. P. C. App. Cas. 318; 45 L. J. P. C. 55; 34 L. T. N. S. 519; 24 W. R. 887.

[4] 129 U. S. 397.

bility for the negligence of its servants in the course of the voyage.

§ 97. Even greater difficulty is experienced in determining the law governing contracts for carriage by water than in that governing contracts for land carriage. Ships make contracts in many countries and have many others in which to fulfil them. Under these circumstances in addition to *lex loci contractus* and *lex loci solutionis* there has appeared that which is sometimes called "the law of the ship." A contract may be executed in a foreign port to be fulfilled in another foreign port. In such cases decisions have been had making, not the law of the place of making nor that of performance, the rule of construction, but the law of the place of residence of the ship's owners and of the registration of the vessel, that is, the law of the ship. So decided Mr. Justice STORY, in the case of Pope *v.* Nickerson.[1] Here a vessel owned in Massachusetts, gave bills of lading for freight in Spain to be delivered in Philadelphia and was obliged to put into Bermuda where the vessel and cargo were sold by the master. It was held in a suit brought on the bills of lading, that the law governing the contract was not the law of Spain where the contract was made, nor yet the law of Pennsylvania where it was to be performed, but the law of Massachusetts, where the owners of the ship resided and where the ship was registered. By the law of Spain and Pennsylvania the master could bind the owners beyond the value of the ship. By the law of Massachusetts he could not. Hence the importance of the decision. The ground taken was that when a "ship is owned and navigated under the flag of a foreign country, the authority of the master to contract for and bind the owners must be measured by the laws of that country, unless he is held out to persons in other countries as possessing a more enlarged authority."

§ 98. The soundness of this decision is questionable. Mr. Chief Justice TANEY in Naylor *v.* Battzell,[2] decided in the Circuit Court of the United States for the district of Maryland, comes to a different conclusion and two well considered opinions[1] rendered by justices of the Supreme Court of Louisiana,

[1] 3 Story Rep. 465.

[2] Taney's C. C. Dec. 55.

on a state of facts similar to that in Pope *v.* Nickerson oppose Mr. Justice STORY's view.[1] In Arrayo *v.* Currell,[2] Mr. Justice MARTIN says: "If there be a principle better established than any other on the subject of the conflict of law, it is, that contracts are governed by the laws of the country in which they are entered into, unless they be so with a view to a performance in another. Every writer on that subject recognizes it. Judicial decisions again and again through the civilized world have sanctioned it. . . . Whoever contracts in a particular place subjects himself to its laws, as a temporary citizen. The idea that the law of a man's domicil follows him through the world and attaches to all his contracts, is as novel as unfounded. This proposition was not indeed maintained in general terms, but that offered to the court, in relation to the contract, is identical with it and it is impossible for us not to feel that if the defendant and appellant is to have the contract decided by the laws of Louisiana, it will be equivalent to a declaration of this amount, that an inhabitant of this State carries its laws with him wherever he goes and they regulate and govern his contracts in foreign countries,—that whether a man contracts with him in Paris or London, our municipal regulations are the measure of the rights and duties of both parties to the contract. That the legislature of Louisiana may have a right to regulate the contracts of her own citizens in every country, so long as they owe her allegiance, may or may not be true. But where the citizen contracts abroad, with a foreigner, it is evident the rule must be limited in its operation. The legislature may refuse permission to enforce the agreement at home, but abroad and particularly where the agreement is entered into, it is valid."

§ 99. *Lex fori* or the law of the court in which a proceeding is brought for the enforcement of a right under, or the remedy for a breach of, the contract relates to the form of the remedy and the mode of enforcing, to the conduct of the suit in court, the rules of evidence and to procedure,[3] but the nature and character of the remedy—for instance the measure of civil

[1] Malpica *v.* McKown, 1 La. Rep. 249; Arrayo *v.* Currell, ib. 528.

[2] La. Rep. 528.

[3] The Halley, 2 L. R. Adm. & Ec. 10.

damages for a breach of contract or for the non-fulfilment of any legal obligation, is not to be regulated by *lex fori*. These are generally governed by *lex loci contractus*.[1]

In a comparatively recent case it was held that whatever concerns the rights of parties in matters of contract is governed by the *lex loci contractus*, and the remedy and whatever relates to the limitation of actions, by the *lex fori*.[2]

[1] The Halley, 2 L. R. Adm. & Ec. 10; Story on Conf. of Laws, § 558 and cases cited; Courtois *v.* Carpentier, 1 Wash. C. C. 376; Consequa *v.* Willings, Peters C. C. 225; The Zollverein, Swab. 98.

[2] Brooke *v.* N. Y., L. E. & W. R. R. Co., 108 Pa. St., 530.

CHAPTER VIII.

THE RIGHT OF CARRIERS TO LIMIT THEIR COMMON LAW LIABILITY.

The law in England, § 100.
Reduced freight a good consideration for diminished liability, § 101.
Is the carrier with limited liability simply a bailee for hire? § 102.
Rule as to the right to limit liability as laid down by the Federal Courts, §§ 103, 104.
Rule in Alabama, § 105.
Rule in Arkansas, § 106.
Rule in California, § 107.
Rule in Colorado, § 108.
Rule in Connecticut, § 109.
Rule in Dakota, § 110.
Rule in Delaware and Florida, § 111.
Rule in Georgia, § 112.
Rule in Illinois, § 113.
Rule in Indiana, § 114.
Rule in Iowa, § 115.
Rule in Kansas, § 116.
Rule in Kentucky, § 117.
Rule in Louisiana, § 118.
Rule in Maine, § 119.
Rule in Maryland, § 120.
Rule in Massachusetts, § 121.
Rule in Michigan, § 122.
Rule in Minnesota, § 123.
Rule in Mississippi, § 124.
Rule in Missouri, § 125.
Rule in Nebraska, § 126.
Rule in New Hampshire, § 127.
Rule in New Mexico, § 128.
Rule in New York, § 129,
Rule in New Jersey, § 130.
Rule in North Carolina, § 131.
Rule in Ohio, § 132.
Rule in Pennsylvania, § 133.
Rule in South Carolina, § 134.
Rule in Tennesse, § 135.
Rule in Texas, § 136.
Rule in Vermont, § 137.
Rule in Virginia, § 138.
Rule in West Virginia, § 139.
Rule in Wisconsin, § 140.
The general American rule, § 141.

§ 100. At common law a common carrier is an insurer of the property received by him for transportation against all loss and damage happening thereto while under his control unless occasioned by the act of God or the public enemy.[1] The question was early raised whether the carrier could limit his common

[1] Price *v.* Hartshorn, 44 Barb. (N. Y.) 655; Fish *v.* Chapman, 2 Georgia, 349; New Jersey Steam Nav. Co. *v.* Merchants' Bank, 6 Howard, 344; Richards *v.* Hansen, 1 Fed. Rep. 54.

law liability by a special contract.[1] By the early part of this century it came to be settled law in England that the carrier could so limit his liability even to the extent of exempting himself from the consequences of his own negligence.[2] Later legislation has however modified the laxity of the rule laid down by the courts. Thus the Railway and Canal Traffic Act, 17–18 Victoria, C. 31, sec. 7, provides that no special contract shall be binding upon the party unless signed by him or the person delivering the goods to be carried and also requires that the conditions of such contract shall be just and reasonable. The effect of this act was to leave to the courts the final decision as to whether any particular contract between a shipper and a carrier contained a reasonable and just limitation of the carrier's liability.[3] The Railway and Canal Traffic Act was not

[1] Southcote's Case, 4 Rep. 84 (1601); Morse *v.* Slue, 1 Vent. 190 (1684); Hide *v.* Proprietors, 1 Esp. 36.

[2] Nicholson *v.* Willan, 5 East, 507; Anonymous *v.* Jackson, Peake's Add. Cas., 183; Covington *v.* Willan, Gow, 115; Munn *v.* Baker, 2 Stark. 226; Clay *v.* Willan, 1 H. Bl. 298; Clarke *v.* Gray, 6 East, 564; Hyde *v.* Trent. Nav. Co., 5 T. R. 389; Izett *v.* Mountain, 4 East, 371; Ranger *v.* Great Western R. R. Co., 1 Railway & Canal Cas. 1; Riley *v.* Horne, 5 Bing. 217; Harris *v.* Packwood, 3 Taunton, 264; Smith *v.* Horne, 8 ib. 144; Leeson *v.* Holt, 1 Stark. 148; Beck *v.* Evans, 16 East, 244; Lowe *v.* Booth, 13 Price, 329; Wyld *v.* Pickford, 8 M. & W. 443; Carr *v.* Lancashire, etc., R. R. Co., 7 Exch. 707; Kirk, etc., R. R. Co. *v.* Crisp, 14 C. B. 527; Slim *v.* Great Northern R. R. Co., 14 C. B. 647; Chippendale *v.* Lancashire, etc., R. R. Co., 7 Railway & Canal Cas. 824; Great Northern R. R. Co. *v.* Morville, 7 ib. 830; Austin *v.* Manchester, etc., R. R. Co., 10 C. B. 454; S. C. 16 Q. B. 600; Shaw *v.* York, etc., R. R. Co., 13 Q. B. 347; 6 Railway Cas. 87; Macauley *v.* Furness R. R. Co., 21 W. R. 140; 27 L. T. N. S. 485; Taubman *v.* Pacific Steam N. Co., 26 L. T., N. S. 704; Glenister *v.* Great Western R. R. Co., 22 W. R. 72; 29 L. T. N. S. 423; Gallin *v.* L. & N. W. R. R. Co., L. R. 10 Q. B. 212; Phillips *v.* Clark, 2 C. B. N. S. 156; 3 Jur. N. S. 467; 26 L. J. C. P. 166.

Canadian Cases: La Pointe *v.* Grand Trunk R. R. Co., 26 U. C. Q. B. 479; Dodson *v.* Grand Trunk Ry. Co., 7 Canada, L. J. N. S. 263, S. C. of Nova Scotia; English rule is defined in Camp. *v.* H. N. Y. Stm. Co., 41 Conn. 333.

[3] See also 31 and 32 Vict., C. 119, sec. 16; 34 and 35 Vict., C. 78, sec. 12; Baxendale *v.* Great Eastern Ry. Co., 38 L. J. Q. B. 137; 4 L. R. Q. B. 244; 17 W. R. 412; 10 B. & S. 212; Morville *v.* Great Northern Ry. Co., 16 Jur. 528; 21 L. J. Q. B. 319; Wise *v.* Great Western Ry. Co., 1 H. & N. 63; 25 L. J. Exch. 258.

adopted in Canada,[1] but the Railway Act of 1879 (42 Vict. C. 9, sec. 25, subsec. 4) declared that the party aggrieved by any neglect or refusal in the premises should have an action therefor against the company, from which action the company should not be relieved by any notice, condition or declaration, if the damage had arisen from any negligence or omission of the company. Hence it was held that a carrier did not escape where stock was killed or lost by its negligence though carried under a bill of lading whereby they were carried entirely at the owner's risk.[2]

§ 101. In the United States it has been held in most of the States that carriers may limit their liability except for negligence, but in order to make the contract for diminished liability binding there must be a consideration therefor. A lower rate of freight is a sufficient consideration.[3] Thus where a shipper refuses to give the value of goods when asked, the carrier may limit his liability and under such circumstances a carriage at a reduced rate is a good consideration for an arbitrary limitation of value on goods contained in the bill of lading.[4] In the State of New York where a carrier agreed to transport cattle at less than one-half the usual rates under a special contract releasing him from liability for loss "from whatever cause arising," it was held that the contract was valid and exonerated the carrier from liability for any injury to the cattle due to the negligence of his employé.[5] Shippers may contract in consideration of reduced freight to exempt the carrier from responsibility for over-crowding and suffocation of life-stock and having made such contract are bound by it.[6]

[1] Hamilton *v.* Railway Co., 23 U. C. Q. B. 600; Harris *v.* Edmonstone, 4 Low. Can. Jur. 40; Samuel *v.* Edmondstone, 1 Low. Can. Jur. 89; Stevenson *v.* Gildersleeve, 2 U. C. C. P. 495.

[2] Dodson *v.* Grand Trunk Ry. Co., 7 Can. Law Journal, 263.

[3] Dillard *v.* Louisville, etc., R. R. Co., 2 Lea (Tenn.), 288; B. & O. R. R. Co. *v.* Brady, 32 Md. 333; Nelson *v.* H. R. R. Co., 48 N. Y. 498; Georgia R. R. Co. *v.* Spears, 66 Georgia, 485; Jennings *v.* Grand Trunk Ry. Co., 52 Hun (N. Y.), 227; McFadden *v.* Mo. Pac. Ry. Co., 92 Mo. 343.

[4] Mather *v.* American Express Co., 2 Fed. Rep. 49.

[5] Mynard *v.* S. B. & N. Y. R. Co., 7 Hun (N. Y.), 399.

[6] Squire *v.* N. Y. C. R. R. Co., 98 Mass. 239.

§ 102. In some of the cases the question has been raised whether a carrier transporting under a bill of lading or other contract limiting his liability, is a special bailee for hire or is still a common carrier with enlarged exemption. In most of the States where the question has been discussed, it has been held that notwithstanding a special contract, a common carrier still remains such and is responsible for a higher degree of diligence than an ordinary bailee. If there be any fault or negligence he is liable in spite of the contract.[1] Hence the proof of a loss within an exception in the bill of lading makes out a *prima facie* case against the carrier and puts upon him the onus of proving that it was not due to his negligence.[2] In Pennsylvania the rule is different. In that State the decisions give to a special contract the effect of converting the common carrier into a special bailee for hire, whose duties are governed by his contract and against whom, if negligence be charged, it must be proved by the party injured.[3]

§ 103. The right of a common carrier to restrict his common law liability by special contract has been fully considered in the Federal Courts where the following propositions are established: that carriers can limit their common law liability by written contract; "that they cannot lawfully stipulate for exemption from responsibility when such exemption is not just and reasonable in the eye of the law and that it is not just and reasonable in the eye of the law for a common carrier to stipulate for exemption from responsibility for the negligence

[1] Kirby *v.* Adams Express Co., 2 Mo. App. 369; Drew *v.* Red Line Transit Co., 3 Mo. App. 495; A. & N. R. R. Co. *v.* Washburn, 5 Neb. 117; Steele *v.* Townsend, 37 Ala. 247; Brown *v.* Adams Ex. Co., 15 W. Va. 812; Kimball *v.* Rutland & Burlington R. R. Co., 26 Vt. 248; Lamb *v.* C. & A. R. R. and Transit Co., 2 Daly, 454; Lengsfield *v.* Jones, 11 La. Ann. Rep. 624; Hunt *v.* Morris, 6 Martin (La.), 676.

[2] Dillard *v.* L. & N. R. R. Co., 2 Lea (Tenn.), 288; Steele *v.* Townsend, 37 Ala. 247.

[3] Verner *v.* Sweitzer, 32 Pa. St. 208; Farnham *v.* C. & A. R. R. Co., 55 ib. 53; American Express Co. *v.* Sands, ib. 140; Patterson *v.* Clyde, 67 ib. 500; R. R. Co. *v.* Lockwood, 17 Wall. 357. See also Moore *v.* Evans, 14 Barbour (N. Y.), 524; Simmons *v.* Law, 3 Keyes (N. Y.), 217.

of himself or his servants."[1] In York Co. *v.* Central R. R. Co.,[2] Mr. Justice FIELD said: "The right of a common carrier to limit his responsibility by special contract has long been the settled law in England. It was the subject of frequent adjudication in her courts and had there ceased to be a controverted point before the passage of the Carriers Act of 1830. In this country it was at one time a subject of much controversy whether any such limitation could be permitted. It was insisted that exercising a public employment the carrier owed duties at common law from which public policy demanded that he should not be discharged even by express agreement with the owner of the goods delivered to him for transportation. . . . . Nor do we perceive any good reason or principle why parties should not be permitted to contract for a limited responsibility. The transaction concerns them only. It involves simply rights of property and the public can have no interest in requiring the responsibility of insurance to accompany the service of transportation in the face of a special agreement for its relinquishment. By the special agreement the carrier becomes with reference to the particular transaction an ordinary bailee and private carrier for hire. The law prescribes the duties and responsibilities of the common carrier. He exercises in one sense a public employment and has duties to the public to perform. Though he may limit his services to the car-

[1] Railroad Co. *v.* Pratt, 22 Wallace, 134. Opinion of Mr. Justice Hunt. See also Railroad Co. *v.* Manufacturing Co., 16 Wall. 318; Bank of Kentucky *v.* Adams Ex. Co., 3 Otto, 174; York Co. *v.* Central Railway, 3 Wall. 107; Railroad Co. *v.* Lockwood, 17 ib. 357; Muser *v.* Holland, 17 Blatchf. 412; Express Co. *v.* Kountze, 8 Wall. 342; New Jersey Steam Nav. Co. *v.* Merchants' Bank, 6 Howard, 344; Express Co. *v.* Caldwell, 21 Wallace, 267; Earnest *v.* The Express Co., 1 Woods, 573; The War Eagle, 6 Bissell, 364; Lord *v.* G. N. & P. S. Co., 4 Sawyer, 292; Ormsby *v.* U. P. Ry. Co., 2 McCrary, 48; Hart *v.* Pennsylvania Railroad Co., ib. 333; Scruggs *v.* B. & O. R. R. Co., 5 ib. 590; The Steamer City of Norwich, 3 Benedict, 575; Hunnewell *v.* Taber, 2 Sprague, 1; The Pacific, 1 Deady, 17; The May Queen, 1 Newb. 465; The New World *v.* King, 16 How. 469; The Rockett, 1 Biss. 354; The David & Caroline, 5 Blatchf. 266; The Bellona, 4 Ben. 503; Nelson *v.* National Steamship Co., 7 ib. 340; The Invincible, 1 Lowell, 225; The Delhi, 4 Ben. 345.

[2] 3 Wallace, 107. See also Liverpool Steam Co. *v.* Phenix Ins. Co., 129 U. S. 397.

riage of particular kinds of goods and may prescribe regulations to protect himself against imposition and fraud and fix a rate of charges proportionate to the magnitude of the risks he may have to encounter, he can make no discrimination between persons or vary his charges from their condition or character. He is bound to accept all goods offered within the course of his employment and is liable to an action in case of refusal. He is chargeable for all losses, except such as may be occasioned by the act of God or the public enemy. He insures against all accidents which result from human agency, although occurring without any fault or neglect on his part and he cannot by any mere act of his own avoid the responsibility which the law thus imposes. He cannot screen himself from liability by any general or special notice, nor can he coerce the owner to yield assent to a limitation of responsibility by making exorbitant charges when such assent is refused. The owner of the goods may rely upon this responsibility imposed by common law which can only be restricted and qualified when he expressly stipulates for the restriction and qualification. But when such stipulation is made and it does not cover losses from negligence or misconduct, we can perceive no just reason for refusing its recognition and enforcement."

§ 104. In Express Company *v.* Caldwell,[1] Mr. Justice STRONG delivering the opinion of the court said: "Notwithstanding the great rigor with which courts of law have always enforced the obligations assumed by common carriers and notwithstanding the reluctance with which modifications of that responsibility imposed upon them by public policy have been allowed, it is undoubtedly true that special contracts with their employers limiting their liability are recognized as valid, if, in the judgments of the court they are just and reasonable, if they are not in conflict with sound legal policy. The contract of a common carrier ordinarily is an assumption by him of the exact duty which the law affixes to the relation into which he enters when he undertakes to carry. That relation the law regards as substantially one of insurance against all loss or damage except such as results from what is denominated the

[1] 21 Wallace, 264.

act of God or of the public enemy. But the severe operation of such a rule in some cases has led to a relaxation of its stringency when the consignor and the carrier agree to such a relaxation. All the modern authorities concur in holding that to a certain extent, the extreme liability exacted by the common law originally, may be limited by express contract. The difficulty is in determining to what extent and here the authorities differ. Certainly it ought not to be admitted that a common carrier can be relieved from the full measure of that responsibility which ordinarily attends his occupation without a clear and express stipulation to that effect obtained by him from his employer. And even when such a stipulation has been obtained the court must be able to see that it is not unreasonable. Common carriers do not deal with their employers on equal terms. There is, in a very important sense, a necessity for their employment. In many cases they are corporations chartered for the promotion of the public convenience. They have possession of the railroads, canals and means of transportation on the rivers. They can and they do carry at much cheaper rates than those which private carriers must of necessity demand. They have on all important routes supplanted private carriers. In fact they are without competition, except as between themselves and that they are thus, is in most cases the consequence of advantages obtained from the public. It is, therefore, just that they are not allowed to take advantage of their powers and of the necessities of the public, to exact exemptions from that measure of duty which public policy demands. But that which was public policy a hundred years ago has undergone changes in the progress of material and social civilization. There is less danger than there was of collusion with highwaymen. Intelligence is more rapidly diffused. It is more easy to trace a consignment than it was. It is more difficult to conceal a fraud. And what is of equal importance the business of common carriers has been immensely increased and subdivided. The carrier who receives goods is very often not the one who is expected to deliver them to the ultimate consignees. He is but one link of a chain. Thus his hazard is greatly increased. His employers demand that he shall be held

responsible, not merely for his own acts and omissions and those of his agents, but for those of other carriers whom he necessarily employs for completing the transit of the goods. Hence, as we have said, it is now the settled law that the responsibility of a common carrier may be limited by an express agreement made with his employer at the time of his accepting goods for transportation, provided the limitation be such as the law can recognize as reasonable and not inconsistent with sound public policy."

§ 105. In Alabama carriers may exempt themselves by contract from liability, except for their own negligence. In South and North Alabama Railroad Co. *v.* Wilson,[1] it was held that when loss or damage to goods occurs while they are in the custody of the carrier, though carried at "owner's risk," the carrier must make at least a *prima facie* showing that it was not caused by his negligence.

Special contracts made by a common carrier with shippers of cattle, restricting and avoiding their liability for the unusual risks peculiar to the transportation of such freight, are maintained and upheld by the courts, when the limitations are just and reasonable and do not exempt the carriers from liability for any loss or injury caused by their own act and negligence.[2]

§ 106. In Arkansas it has been held in a recent case that a common carrier may contract for exemption and for unavoidable accidents, but not for exemption from liability for losses

[1] 78 Ala. 587; see also East T., Va., and Georgia R. Co. *v.* Johnston, 75 Ala. 596; Alabama Gt. South. R. R. Co. *v.* Little, 71 ib. 611; L. & N. R. R. Co. *v.* Oden, 80 ib. 38; L. & N. R. R. Co. *v.* Sherrod, 84 ib. 178; Steele *v.* Townsend, 37 ib. 247; Southern Express Co. *v.* Caperton, 44 ib. 101; Southern Express Co. *v.* Crook, 44 ib. 468; Southern Express Co. *v.* Armstead, 50 ib. 350; Grey's Ex'r *v.* Mobile, T. Co., 55 ib. 387; S. & N. A. R. R. Co. *v.* Henlein, 52 ib. 606; ib. 56 ib. 368; M. & O. R. R. Co. *v.* Jarboe, 41 ib. 644; Hibler *v.* McCartney, 31 ib. 501; Jones *v.* Pitcher, 3 St. & P. 135; McClure *v.* Cox, 32 Ala. 617; Sampson *v.* Gazzam, 6 Port. 123; Ezell *v.* Miller, ib. 307; Ezell *v.* English, ib. 311; Wayland *v.* Mosely, 5 Ala. 430; Cent. R., etc., Co. *v.* Smitha, 85 ib. 47; West. R. Co. *v.* Little, 86 ib. 159.

[2] East T., Va., and Georgia R. Co. *v.* Johnston, 75 Ala. 596; Alabama G. S. R. Co. *v.* Thomas Sons, 83 ib 343; Central R. & Banking Co. *v.* Smith & Chastain, 85 ib. 47.

occurring from his and his servant's negligence, or for any other exemption not just and reasonable in the eyes of the law.[1]

§ 107. In California, in Hooper *v.* Wells[2] (the only case bearing upon the question), the right of the carrier to contract for a limited liability was admitted, but the court declined "to determine the more difficult question in the present state of the authorities, as to the power of common carriers by special contract to exonerate themselves from liabilities arising from the negligence of those employed by them in their business of carriers."

§ 108. In Colorado, while a carrier may by special contract "excuse himself for accidental losses, he will, nevertheless, continue responsible for all damages occasioned by negligence or misfeasance in him or his servants."[3]

§ 109. In Connecticut a carrier may by contract limit his liability, but cannot discharge himself from the consequences of his negligence,[4] nor can he limit his liability by a notice to which no assent has been given.[5]

§ 110. In Dakota the code, section 1263, provides that a consignor, by accepting a written contract for carriage, with knowledge of its terms, assents to the rate of hire and the time, place and manner of delivery therein stated, but that his assent to any other modifications of the carrier's obligations contained in such instrument can only be manifested by his signature thereto.

§ 111. In Delaware and Florida there is apparently no adjudication of the question as to the carrier's right to limit his liability.[6]

[1] L. R. M. R. & T. Co. *v.* Talbot 47 Ark. 97; St. L. I. M. & S. R'y *v.* Lesser, 46 ib. 236; Little Rock, etc., R'y *v.* Daniels, 49 ib. 352.

[2] 27 California, 11. Opinion by Sawyer, J.

[3] Merchant's Dispatch, etc., Co. *v.* Cornforth, 3 Col. 280; opinion by Thacher, C. J.; Western Union Tel. Co. *v.* Graham, 1 Col. 230.

[4] Welch *v.* B. & A. R. R. Co., 41 Conn. 333; Camp *v.* Hartford, etc., St'm Co., 43 ib. 333; also reported 3 Law & Eq. Reporter, 515; Laurence *v.* N. P. & B. R. R. Co., 36 Conn. 63; Derwort *v.* Loomer, 21 ib. 245; Hale *v.* N. J. St'm Nav. Co., 15 ib. 539.

[5] Peck *v.* Weeks, 34 Conn. 145.

[6] The rule of the Federal Courts would probably be followed. Flinn *v.* Phila. etc. R. R. Co., 1 Houston, 469; Bennett *v.* Filyaw, 1 Fla. 403; Brock *v.* Gale, 14 ib. 523.

§ 112. In Georgia it is required by statute that the express assent of the owner be obtained to any contract limiting the liability of a carrier and such assent will not be presumed from the mere acceptance of a receipt containing the condition of limitation except as to a condition limiting the amount of liability to a fixed sum unless a greater sum should be specified in the receipt.[1] Where the owner of goods fills up a receipt for them which is signed by the carrier and returned to him containing a printed clause limiting the liability of the carrier, he knowing the terms of the clause, this is an express contract under the statute.[2]

The express contract required by the statute may be made by parol and parol evidence is admissible to show such a contract although a receipt be given by a clerk of the carrier containing no restrictive clause.[3] A general stipulation or notice in a bill of lading is not sufficient to limit a carrier's liability. An express contract is necessary.[4] This, however, will not relieve from the consequences of negligence. Such a contract may be incorporated into the bill, if it be signed by both parties.[5] A common carrier of live stock in Georgia may limit his liability by special contract, otherwise he is liable as in case of other property except for the inherent quality and natural actions of the animals.[6]

The right to limit liability extends to all damage disconnected and apart from the conduct or running of the trains.[7]

§ 113. In Illinois, carriers may limit their liability by express contract, but not for losses caused by their own or their servant's negligence or wilful misconduct,—such stipulation being against public policy.[8]

[1] Southern Express Co. *v.* Newby, 36 Ga. 635; Mosher *v.* Southern Ex. Co., 38 ib. 37; East Tenn. Va. & Ga. R. R. Co. *v.* Wright, 76 ib. 532.

[2] Wallace *v.* Mathews, 39 ib. 617; Wallace *v.* Sanders, 42 ib. 486.

[3] Purcell *v.* Southern Ex. Co., 34 ib. 315; Southern Ex. Co. *v.* Barnes, 36 ib. 532; Southern Ex. Co. *v.* Purcell, 37 ib. 103.

[4] Ga. R. R. Co. *v.* Gann, 68 ib. 350.

[5] Same *v.* Spears, 66 ib. 485.

[6] Ga. R. R. Co. *v.* Spears, 66 ib. 485.

[7] Same *v.* Beatie, 66 ib. 438.

[8] Ill. Cent. R. R. Co. *v.* Adams, 42 Ill. 474; Ill. Cent. R. R. Co. *v.* Morrison, 19 ib. 136; Ill. Cent. R. R. Co. *v.* Smyser, 38 ib. 354; Erie

A common carrier in Illinois may qualify his liability by general notice to all who may employ him, of any reasonable requisition to be observed on their part in regard to the manner of delivery and entry of parcels and such matters, but cannot avoid his liability as an insurer of goods entrusted to him during their conveyance, by any such notice.[1] Where there is a stipulation of liability only for gross negligence and assented to by the shipper, still the carrier will be bound to reasonable care.[2]

A general notice by advertisement or by conditions printed on the back of a bill of lading, receipt, ticket, or other voucher will not do. The carrier cannot limit his liability by his own act alone.[3] Conditions inserted in a receipt or bill of lading and assented to by the shipper will bind the latter,—a contract having been thus made in the terms of the receipt or bill.[4]

In a Federal case[5] where the Illinois law came under consideration, the court said, "I do not think that the statute of Illinois intended that a common carrier should be prevented from limiting its liability where it asks for the value of a commodity whose transportation it undertakes and the information is withheld."

§ 114. A carrier may, in Indiana, limit his liability by special contract, but he may not contract against negligence. The distinction of degrees of negligence, slight, ordinary and gross, is not well founded. Public policy will not allow a carrier to stipulate for any degree, however slight, any more than

R. R. Co. *v.* Wilcox, 84 ib. 239; Adams Ex. Co. *v.* Stettaners, 61 ib. 184; Boscowitz *v.* Adams Ex. Co., 93 ib. 523.

[1] Western Trans. Co. *v.* Newhall, 24 Ill. 466.

[2] Adams Ex. Co. *v.* Stettaners, 61 Ill. 184.

[3] Western Trans. Co. *v.* Newhall, 24 Ill. 466; Ill. Cent. R. R. Co. *v.* Frankenberg, 54 ib. 88; Merchant's Desp. Trans. Co. *v.* Theilbar, 86 ib. 71.

[4] Anchor Line *v.* Dater, 68 Ill. 369; Merchant's Despatch Trans. Co. *v.* Theilbar, 86 ib. 71; Ill. Cent. R. R. Co. *v.* Frankenberg, 54 ib. 88; Western Trans. Co. *v.* Newhall, 24 ib. 466; Baker *v.* Michigan, etc., R. R. Co., 42 ib. 73; Field *v.* Chicago, etc., R. R. Co., 71 ib. 458; Ill. Cent. R. R. Co. *v.* Morrison, 19 ib. 136; Chicago, etc., R. R. Co. *v.* Montfort, 60 ib. 175; Ill. Cent. R. R. Co. *v.* Smyser, 38 ib. 354; Ill. Cent. R. R. Co. *v.* Read, 37 ib. 484; Boscowitz *v.* Adams Ex. Co., 93 ib. 523; Merchant's Despatch Trans. Co. *v.* Leyson, 89 ib. 43; Merchant's Despatch Trans. Co. *v.* Joesting, ib. 152.

[5] Mather *v.* American Ex. Co., 9 Bissell, 293.

for gross negligence. The carrier is responsible when any negligence of himself or his servants contributed in any degree to the loss of property being transported.[1] He cannot restrict his liability by notice.[2] The Supreme Court of Indiana said, in 1867, that they were not prepared to hold that carriers could limit their liability by a usage or custom of their own creation.[3]

§ 115. In Iowa, it is provided by statute that "in the transportation of persons or property by any railroad or other company, or by any person or firm engaged in the business of transportation of persons or property, no contract, receipt, rule, or regulation shall exempt such railroad or other company, person, or firm from the full liabilities of a common carrier, which in the absence of any contract, receipt, rule, or regulation would exist with respect to such persons or property."[4]

This act does not affect contracts for the carriage of goods beyond the carrier's own line.[5] It applies to a contract made in Iowa, but to be performed in another state where no such legislation exists. A contract void or illegal where it is made is so everywhere.[6] It is not directed simply against contracts without consideration, but declares that all contracts limiting the carrier's liability are inoperative.[7] It includes contracts for the carriage of live stock.[8]

By the statutes of Iowa, it is further provided that "every railroad company shall be liable for all damages sustained by any person, including employés of the company, in consequence

[1] U. S. & N. I. R. Co. *v.* Heaton, 37 Ind. 448; St. Louis, etc., R. Co. *v.* Smuck, 49 ib. 302; Ohio, etc., R. Co. *v.* Selby, 47 ib. 471; U. S. Ex. Co. *v.* Harris, 51 ib. 127; Adams Ex. Co. *v.* Reagan, 29 ib. 21; Indianapolis, etc., R. Co. *v.* Allen, 31 ib. 394; Wright *v.* Gaff, 6 ib. 416; Thayer *v.* St. Louis, etc., R. Co., 22 ib. 26; Adams Ex. Co. *v.* Fendrick, 38 ib. 150.

[2] Indianapolis, etc., R. Co. *v.* Cox, 29 Ind. 360; E. & C. R. R. Co. *v.* Young, 28 ib. 516.

[3] E. & C. R. R. Co. *v.* Young, 28 ib. 516.

[4] Laws of 1866, c. 113, p. 121. The act has been applied in the following cases: McCune *v.* B. C. R. & N. R. Co., 52 Iowa, 600; Rose *v.* Des Moines Valley R. Co., 39 ib. 246.

[5] Mulligan *v.* Ill. Cent. R. Co., 36 ib. 181.

[6] McDaniel *v.* Chicago, etc., R. Co., 24 ib. 412.

[7] Brush *v.* S. A. & D. R. Co., 43 ib. 554.

[8] McCoy *v.* K. & D. M. R. Co., 44 ib. 424; German *v.* C. & N. W. R. Co., 38 ib. 127.

of any neglect of the agents, or by any mismanagement of the engineers or other employés of the corporation, to any person sustaining such damage, all contracts to the contrary notwithstanding."[1]

§ 116. The rule in Kansas is that a carrier may relieve himself from his common law liability by special contract, but not from loss due to his negligence.[2]

§ 117. A common carrier in Kentucky may limit his liability by a special contract, but may not thus escape liability for negligence.[3] The common law liability of a carrier does not apply to the transportation of live stock, but a high degree of diligence is required.[4] Conditions different from those prescribed by law, will not be implied from publication of a notice, nor otherwise than from an express contract.[5]

§ 118. In Louisiana it was in 1883 held to be settled law that a carrier may limit his obligation by express contract either parol or written, but nothwithstanding a special agreement he is still liable for the carelessness or unskilfulness of his servants, not only gross but ordinary.[6] In this State a carrier is responsible for loss or damage resulting to the cargo confided to him from neglect, imprudence or want of skill, notwithstanding a stipulation to the contrary in the bill of lading.[7] In 1876 it was said: "All contracts may be made except those reprobated by law or public policy and a contract by which one stipulates for exemption from responsibility for losses occa-

[1] Laws 1866, c. 113, p. 121.

[2] K. C. St. J. & C. B. R. R. Co. *v.* Simpson, 30 Kan. 645; K. R. R. Co. *v.* Reynolds, 17 ib. 251; M. V. R. R. Co. *v.* Caldwell, 8 ib. 244; Kallman *v.* U. S. Ex. Co., 3 ib. 205; Goggin *v.* K. R. R. Co., 12 ib. 416; K. P. R. R. Co. *v.* Nichols, 9 ib. 235; St. L. K. C. & N. R. R. Co. *v.* Piper, 13 ib. 505; K. P. R. R. Co. *v.* Reynolds, 8 ib. 623.

[3] Rhodes *v.* L. & N. R. R. Co., 9 Bush (Ky.), 688; L. C. & L. R. R. Co. *v.* Hedger, ib. 645; Adams Ex. Co. *v.* Guthrie, ib. 78; Adams Ex. Co. *v.* Loeb, 7 ib. 499; Adams Ex. Co. *v.* Nock, 2 Duv. 562; Reno *v.* Hogan, 12 B. Monroe, 63.

[4] L. C. & L. R. R. Co. *v.* Hedger, 9 Bush, 645.

[5] Overdoff *v.* Adams Ex. Co., 3 Bush, 194.

[6] Tardos *v.* C., St. L. & N. O. R. R. Co., 35 La. Ann. Rep. 15; Roberts *v.* Riley, 15 ib. 103; New Orleans Mut. Ins. Co. *v.* New Orleans R. R. Co., 20 ib. 302; Simon *v.* The Fung Shuey, 21 ib. 363; Baldwin *v.* Collins, 9 Robinson, 468.

[7] Newman *v.* Snowker, 25 La. Ann. Rep. 303.

sioned to another from the negligence of his agents or servants is not against public policy or forbidden by law, but if the losses resulted from the fraudulent, wilful or reckless misconduct of the agent or employé, it would be."[1]

A carrier may limit his responsibility by a special notice of the extent of liability he intends to assume.[2]

§ 119. In Maine a carrier may by contract or special notice brought home to and assented to by the owner, restrict its common law liability against accidental loss or injury, but not against negligence.[3]

§ 120. In Maryland a common carrier may by express contract limit his liability. Where indemnity from liability for loss is claimed by virtue of such a contract the burden of proof to establish it is on the carrier. It must be shown that the shipper had notice or actual knowledge of the terms of such a contract and that they were assented to by him. If no release be signed, although the special rates are accepted, the contract is not consummated between the parties.[4] The agreement ought to be in clear and distinct terms and the limitations must be reasonable and just.[5]

Contracts with a restricted liability are specially authorized for the transportation of live stock by the act of 1830, ch. 117.[6]

§ 121. It is well settled in Massachusetts that common carriers may by special contract limit their liability, except in case of negligence or misconduct.[7] It is equally well settled that a common carrier may limit his responsibility for property intrusted to him, by a notice containing reasonable and suitable

[1] Higgins *v.* New Orleans, etc., R. R. Co., 28 La. Ann. Rep. 133.

[2] Thomas *v.* Ship Morning Glory, 13 La. Ann. Rep. 269.

[3] Little *v.* Boston & Maine R. R. Co., 66 Me. 239; Willis *v.* Grand Trunk R. R. Co., 62 ib. 488; Sager *v.* P. R. R. Co., 31 ib. 228; Bean *v.* Green, 12 ib. 422; Fillebrown *v.* Grand Trunk R. R. Co., 55 ib. 462.

[4] B. & O. R. Co. *v.* Brady, 32 M. 333; Brehme *v.* Adams Express Co., 25 ib. 328; Bankard *v.* B. & O. R. Co., 34 ib. 197.

[5] McCoy *v.* Erie, etc., Transportation Co., 42 Md. 498.

[6] Bankard *v.* B. & O. R. R. Co., 34 Md. 197.

[7] Hoadley *v.* N. Trans. Co., 115 Mass. 304; School Dist. *v.* B. H. & E. R. R. Co., 102 ib. 552; Pemberton *v.* N. Y. C. R. R. Co., 104 ib. 144; Grace *v.* Adams, 100 ib. 505; Squire *v.* N. Y. C. R. R. Co., 98 ib. 239.

restrictions, if brought home to the owner of goods delivered for transportation and assented to clearly and unequivocally by him.[1]

Although brought home to the knowledge of the owner or consignor, the notice does not operate to relieve the carrier from liability for loss occasioned by causes other than the act of God or the public enemy.[2] A carrier cannot by a general notice exonerate himself entirely from his legal liability, nor limit it absolutely to a certain amount beyond which he will not be held responsible in case of injury or loss.[3]

§ 122. In 1853 the Supreme Court of Michigan said that the charter of the M. C. R. R. Co. was in the nature of a contract with the State; that the company should become and remain a carrier as at common law and its liability as such became irrevocably fixed and could not be altered or modified by any stipulation or contract.[4] Three judges dissented from this opinion and it was overruled in 1859, when the court decided that a corporation which is a common carrier by its charter and required to transport merchandise and property without showing partiality or favor has the same power to contract for a limitation of its liability as any other carrier and that no consideration of public policy is contravened by the exercise of such power.[5]

A carrier may limit his liability by contract, but not by mere notices published, posted, indorsed on a receipt or otherwise brought to the knowledge of the consignor.[6] It is provided in this State by statute that no railroad company shall be permitted to change or limit its common law liability as a common carrier by any contract or in any other manner except by a written contract none of which shall be printed, which shall be signed by the owner or shipper of the goods to be carried.[7]

[1] Buckland *v.* Adams Ex. Co., 97 Mass. 124; Brown *v.* Eastern R. R. Co., 11 Cushing, 97; Malone *v.* B. & W. R. R. Co., 12 Gray, 388; Gott *v.* Dinsmore, 111 Mass. 45.

[2] Perry *v.* Thompson, 98 Mass. 249.

[3] Judson *v.* Western R. Corp., 88 Mass. 486.

[4] M. C. R. R. Co. *v.* Ward, 2 Mich. 538.

[5] M. C. R. R. Co. *v.* Hale, 6 ib. 243.

[6] McMillan *v.* Mich. Southern, etc., R. R. Co., 16 Mich. 79; Hartness *v.* Grt. Western R. R. Co., 2 Brown, 80.

[7] Mich. Comp., L. 1871, p. 783, § 2386.

§ 123. In Minnesota a carrier may limit his liability by contract, but not for loss due to his own negligence or that of his agents.[1]

§ 124. By an Act of the Legislature of Mississippi, passed December 9, 1863, railroad companies were made responsible as common carriers at common law, notwithstanding any special contract with the shipper of goods.[2] This was subsequently (in 1871) repealed and in 1874 it was held that the carrier may by contract, but not by notice, provide for a limitation of, or exemption from, liability for losses arising from those accidents and casualties which prudence, skill and care cannot always prevent or guard against.[3] Recent cases have confirmed the holding that a common carrier in Mississippi may by special contract stipulate for exemption from the liability imposed by the common law, but may not thus secure exemption from the consequences of negligence or misconduct.[4]

§ 125. In Missouri a common carrier may limit his common law liability by special contract, but cannot exempt himself from liability for his negligence.[5] He "cannot vary his liability by inserting conditions in his acceptance of goods, but to have the effect of exonerating him, there must be a special contract assented to by the shipper."[6]

§ 126. In Nebraska "a carrier cannot limit his liability by contract, so as to cover his own or his servant's negligence."[7]

§ 127. In New Hampshire a carrier may limit his liabilty by special contract, but not by notice even though brought home to the shipper's knowledge.[8]

[1] Shriver *v.* Sioux City, etc., R. R. Co., 24 Minn. 506; Christenson *v.* American Ex. Co., 15 ib. 270; Jacobus *v.* St. Paul, etc., R. R. Co., 20 ib. 125.

[2] M. & O. R. R. Co. *v.* Franks, 41 Miss. 494.

[3] M. R. R. Co. *v.* Weiner, 49 Miss. 725.

[4] Chicago, St. L. & N. O. R. R. Co. *v.* Abels, 60 Miss. 1017; Chicago, St. L. & N. O. R. R. Co. *v.* Moss, 60 ib. 1003.

[5] McFadden *v.* Mo. Pac. R'y Co., 92 Mo. 343; Oxley, St. L., etc., R. R. Co., 65 ib. 629; Rice *v.* K. P. R. R. Co., 63 ib. 314: Snider *v.* Adams Express Co., ib. 376; Kirby *v.* Adams Express Co., 2 Mo. App. 369; Lupe *v.* A. & P. R. R. Co., 2 ib. 77.

[6] Levering *v.* Union Trans. Co., 42 Mo. 88.

[7] Atchison & Nebraska R. R. Co. *v.* Washburn, 5 Neb. 117.

NOTE.—There are no decisions on the point in Nevada.

[8] Moses *v.* B. & M. R. R. Co., 32 N. H. 523; Barter *v.* Wheeler, 49

§ 128. The statute of New Mexico (Laws, 1865–66, 226), does not alter the common law liability of a carrier, but only enables the carrier to diminish it by making special contracts.[1]

§ 129. In New York common carriers may by special contract exempt themselves from liability for loss due to their own or their servant's negligence,[2] or even their wilful or criminal acts.[3]

Where a contract is relied on to relieve the carrier from liability for negligence, it must be so explicit as to leave no reasonable doubt of its meaning and intent.[4] "When general words may operate without including the negligence of the carrier or his servants, it will not be presumed that it was intended to include it. Every presumption is against an intention to contract for immunity for not exercising ordinary diligence in the transaction of any business and hence the general rule is that contracts will not be so construed unless expressed in unequivocal terms."[5]

The common law liability of common carriers cannot be limited by a notice, even though such notice be brought to

ib. 9; Rixford *v.* Smith, 52 ib. 355; Moses *v.* B. & M. R. R. Co., 24 ib. 71.

[1] Seligman *v.* Armijo, 1 New Mexico, 459.

[2] Mynard *v.* S. B. & N. Y. R. R. Co., 7 Hun, 399; Mynard *v.* S. B. & N. Y. R. Co., 71 N. Y. 180; Maguire *v.* Dinsmore, 56 N. Y. 168; Blair *v.* Erie R. R. Co., 66 ib. 313; Westcott *v.* Fargo, 63 Barb. 349; Cragin *v.* N. Y. C. R. Co., 51 N. Y. 61; Poucher *v.* N. Y. C. R. Co., 49 ib. 263; Guillaume *v.* H. & A. Packet Co., 42 ib. 212; Sunderland *v.* Westcott, 2 Sweeney, 260; Prentice *v.* Decker, 49 Barb. 21; Heineman *v.* G. T. R. R. Co.; 31 How. Pr. 430; Price *v.* Hartshorn, 44 ib. 655; Spinetti *v.* Atlas Steamship Co., 80 ib. 71.

[3] Knell *v.* U. S. & B. S. S. Co., 1 J. & Sp. 423.

[4] Blair *v.* Erie R. R. Co., 66 N. Y. 313; Maguire *v.* Dinsmore, 56 ib. 168; Edsall *v.* C. & A. R. & T. Co., 50 ib. 661; Fibel *v.* Livingston, 64 Barb. 179; Belger *v.* Dinsmore, 51 N. Y. 166; French *v.* B. & E. R. R. Co., 4 Keyes, ib 108.

[5] Mynard *v.* S. B. & N. Y. R. Co., 71 N. Y. 180; Potter *v.* Sharp, 24 Hun, 179; Holsapple *v.* R. W. & O. R. Co., 86 N. Y. 275; Nicholas *v.* N. Y. C. & H. R. R. Co., 89 ib. 370; Wilson *v.* N. Y. C. & N. R. R. Co., 27 Hun, 149; Hill *v.* S. B & N. Y. R. R. Co., 73 N. Y. 351; Degitz *v.* Holland (N. Y. Marine Ct.), 6 Chic. Leg. News, 224.

the knowledge of the persons whose property they carry.[1] It has been held that a common carrier cannot limit his liability by a memorandum or note on the card or ticket which he delivers on the receipt of goods to be transported by him. The indorsement on the back of such a card delivered to the servant of the shipper does not amount in law to a special contract, by which a carrier can limit his liability.[2]

§ 130. In New Jersey the presumption that a carrier is transporting goods subject to his common law liability remains until it is overcome by positive proof of a special agreement[3] and in 1860 it was said that it seemed to be well established that special contracts could be made by carriers, but that the great weight of authority seemed to be that they could not make contracts to protect themselves in case of their own clear and palpable wrongs, either of omission or commission, and negligence is such a wrong.[4] Nothing short of an express stipulation, by parol or writing, should be permitted to discharge a carrier from the duties which the law annexes to his employment. The exemptions should be specific and certain, leaving no room for controversy between the parties.[5]

In the case of Kinney *v.* The Central Railroad Company, a contract by a passenger that he would, in consideration of free passage, release the company from liability for injury to his person, though caused by the negligence of the company's servants, was held binding and valid.[6]

§ 131. It has been decided in North Carolina that the carrier's liability may be limited by contract, except for loss or damage due to his negligence.

The limitation may also be secured by special notice brought

[1] Westcott *v.* Fargo, 63 Barb. 349; Blossom *v.* Dodd, 43 N. Y. 264; Dorr *v.* N. J. Stm. Nav. Co., 11 ib. 485; Slocum *v.* Fairchild, 7 Hill, 292; Hollister *v.* Nowlen, 19 Wend. 234; Cole *v.* Goodwin, 19 ib. 251; Clark *v.* Faxton, 21 ib. 153; C. & A. R. & T. Co. *v.* Belknap, ib. 354.

[2] Limberger *v.* Wescott, 49 Barb. 283; Sunderland *v.* Westcott, 2 Sweeney, 260; Nevins *v.* Bay State Stm. Co., 4 Bosw. 225; Gould *v.* Hill, 2 Hill, 623.

[3] N. J. R. R. & Trans. Co. *v.* Penna. R. R. Co., 3 Dutcher, 100.

[4] Ashmore *v.* Penna. Steam Towing Trans. Co., 4 ib. 180.

[5] The Pacific, Deady (U. S. D. C.), 17.

[6] 34 N. J. Law, 513; 32 ib. 407.

home to the shipper, for loss of perishable or unusually valuable articles, but cannot be secured by general notice.[1]

§ 132. In Ohio the carrier may limit his common law liability for losses by a contract, either verbal or in writing, but cannot exempt himself from liability for loss or damage occasioned by his own negligence or that of his servants. "In an action against him as such carrier when he has received and undertaken to carry goods, the burden is upon him to establish such modified liability and to show that the loss falls within the terms of the agreement.[2]

§ 133. In Pennsylvania a carrier may by special contract limit his liability for loss or injury to goods carried by him as to every cause of injury, save that arising from his own negligence or that of his servants.[3] He may also qualify his liability by general notice. Proof of general notice must be such as amounts to actual notice or shown to have been so conspicuous, that the party sought to be affected by it could not have failed to discover it without gross negligence. This qualification does not affect the carrier's liability for negligence.[4] In 1848 it was said: "It has been a subject of frequently

[1] Weinberg *v.* A. & R. R. R. Co., 91 N. C. 31; Phifer *v.* C. C. R. R., 89 ib. 311; Whitehead *v.* W. & W. R. R. Co., 87 ib. 255; Cape Hart *v.* S. & R. R. R. Co., 81 ib. 438; Lee *v.* R. & G. R. R. Co., 72 ib. 236; Smith *v.* N. C. R. R. Co., 64 ib. 235; Williams *v.* Branson, 1 Murphey, 417.

[2] P. C. & St. L. R. R. Co. *v.* Barrett, 36 Ohio St. 448. Opinion, Johnson, J. Union Ex. Co. *v.* Graham, 26 ib. 595; Welsh *v.* P. Ft. W. & C. R. R. Co., 10 ib. 65; Graham *v.* Davis, 4 ib. 362; Davidson *v.* Graham, 2 ib. 131; Gaines *v.* Union Trans. Co., 28 ib. 418; see also Railroad Company *v.* Lockwood, 17 Wallace, 357.

NOTE.—Oregon is barren of decisions upon the point.

[3] Farnham *v.* Camden, etc., R. R. Co., 55 Pa. St. 53; Adams Ex. Co. *v.* Sharpless, 77 Pa. St. 516; American Ex. Co. *v.* Second Nat. Bank, 69 ib. 394; Colton *v.* Cleveland, etc., R. R. Co., 67 Pa. St. 211; Empire Trans. Co. *v.* Wamsutta, etc., Co., 63 ib. 14; Pennsylvania R. R. Co. *v.* Butler, 57 ib. 335; American Ex. Co. *v.* Sands, 55 ib. 140: Pennsylvania R. R. Co. *v.* Henderson, 51 ib. 315; Powell *v.* Penna. R. R. Co., 32 ib. 414; Goldey *v.* Pennsylvania R. R. Co., 30 ib. 242; Penna. R. R. Co. *v.* McCloskey, 23 ib. 526; Bingham *v.* Rogers, 6 Watts & Sergeant, 495; Attwood *v.* Reliance Trans. Co., 9 Watts, 87; P. R. R. Co. *v.* Fries, 87 Pa. St. 234; Chouteaux *v.* Leech, 18 Pa. St. 224; Pennsylvania R. R. Co. *v.* Rapordon, 119 ib. 577.

[4] Verner *v.* Sweitzer, 32 Penna. St. 208; Farnham *v.* Camden, etc., R. R.

expressed regret by many of our judges, that a common carrier was ever permitted to limit the responsibility which as a general rule binds him for the absolute safety of the goods committed to him. The expediency of recognizing in him a right to do so by a general notice . . . . has been strongly and justly questioned and, in some of our sister States, altogether denied. Were the question an open one in Pennsylvania I should for one, unhesitatingly follow them in repudiating a principle which places the bailor absolutely at the mercy of the carrier, whom in a vast majority of instances he cannot but choose to employ."[1] Though he may limit his responsibility by a general notice, yet the terms of the notice must be clear and explicit and the persons with whom he deals must be informed of the terms and the effect of the notice which must be printed in a language understood by them. Thus, where the notice was in the English language and a passenger was a German who did not understand English, it was held to be incumbent on the carrier to prove that the passenger had knowledge of the limitation.[2] In Forepaugh *v.* Del., etc., R. R. Co.,[3] it was held that a contract exempting a railroad company from liability for its negligence, though contrary to public policy in Pennsylvania, will, notwithstanding, be enforced in the courts of Pennsylvania if it is made and is to be performed in a State where such a contract is valid.

§ 134. In South Carolina a carrier may limit his liability by express contract but not for negligence.[4] It would seem that it may also be done by notice.[5]

Co., 55 ib. 53; Bingham *v.* Rogers, 6 Watts & Sergeant, 495; Beckman *v.* Shouse, 5 Rawle, 179; Whitesell *v.* Crane, 8 Watts & Sergeant, 369. See also Railroad Co. *v.* Lockwood, 17 Wall. 357.

[1] Laing *v.* Colder, 8 Penna. St. 479. Opinion of Bell, J.

[2] Camden, etc., R. R. Co. *v.* Baldauf, 16 Pa. St. 67.

[3] 6 Pa. County Ct. Rep. 228.

NOTE.—The question has not arisen in Rhode Island. See however Hubbard *v.* Harnden Ex. Co., 10 R. I. 244.

[4] Porter *v.* Southern Ex. Co., 4 S. C. 135; Levy *v.* Southern Ex. Co., ib. 234; Swindler *v.* Hilliard, 2 Rich. Rep. 286; Baker *v.* Bruison, 9 ib. 201; Patton *v.* Magrath, Dudl. 159; Singleton *v.* Hilliard, 1 Strobh. 203; Wallingford *v.* Columbia, etc., R. R. Co., 26 ib. 258.

[5] Levy *v.* Southern Ex. Co., 4 S. C. 234; Patton *v.* Magrath, Dudl. 159.

§ 135. A carrier may, in Tennessee, restrict his liability by contract, but cannot thus exempt himself for the result of negligence.[1] He cannot limit his liability by general notice.[2]

§ 136. In Texas, by the law of 1863, carriers cannot limit their common law liability by notice, special contract or in any other way whatsoever.[3] By an act passed in Texas in 1860, it is provided "that railroad companies and other common carriers of goods, wares and merchandise for hire within this State, on land or in boats or vessels on the waters entirely within the body of this State shall not limit or restrict their liability, as it exists at common law by any general or special notice, nor by inserting exceptions in the bill of lading or memorandum given upon the receipt of the goods for transportation nor in any other manner whatever and no special agreement, made in contravention of the foregoing provisions of this section, shall be valid.[4]"

§ 137. The liability of a carrier may be restricted in Vermont by special contract and by a general notice, if the terms of the notice are clearly proved to have been assented to by shipper.[5]

§ 138. In Virginia a carrier may limit his common law liability either by notice brought home to the owner of the goods or by inserting just and reasonable exemptions from liability in the bill of lading or other contract, but he cannot exempt himself from liability, by express contract or otherwise, from the consequences of his negligence.[6]

[1] Olwell *v.* Adams Ex. Co., 1 Cent. L. J. 186; Craig *v.* Childress, Peck, 270; Nashville, etc., R. R. Co. *v.* Jackson, 6 Heisk. 271; Southern Ex. Co. *v.* Womack, 1 ib. 256; East Tennessee, etc., R. R. Co. *v.* Nelson, 1 Cold. 272; Dillard *v.* Louisville, etc., R. R. Co., 2 Lea, 288; Smith *v.* Louisville, etc., R. R. Co., 86 Tenn. 198; Glenn *v.* Southern Ex. Co., 86 ib. 594.

[2] Walker *v.* Skipwith, Meigs, 502.

[3] Houston, etc., R. R. Co. *v.* Burke, 55 Tex. 323; Gulf, etc., Ry. Co. *v.* Trawick, 68 Tex. 314; Evansville R. R. Co. *v.* Burne, 55 ib. 323; Fowler *v.* Davenport, 21 ib. 626; Austin *v.* Talk, 20 ib. 164; Cantu *v.* Bennet, 39 ib. 303.

[4] Paschal's Digest, Dec. Art. 4253.

[5] Farmers', etc., Bank *v.* Champlain Trans. Co., 18 Vt. 131; S. C. 23 ib. 186; Kimball *v.* Rutland, etc., R. R. Co., 26 ib. 247; Blumenthal *v.* Brainerd, 38 ib. 402; Mann *v.* Birchard, 40 ib. 326.

[6] Virginia, etc., R. R. Co. *v.* Sayers, 26 Grattan, 328; Wilson *v.* Chesapeake, etc., R. R. Co. 21 ib. 654.

§ 139. In 1865 in West Virginia it was held that "it is competent for a common carrier to diminish and restrict his common law liability by special contract and that he may by express stipulations also absolve himself from all liability resulting from any and every degree of negligence however gross (if it fall short of misfeasance or fraud), provided the terms and language of the contract are so clear and definite as to leave no doubt that such was the understanding and intention of the parties."[1]

In 1878 this statement of the law was materially modified in the case of Maslin *v.* Baltimore & Ohio Railroad Company[2] where, after conceding the right of a carrier to limit his liability by special contract, it is said, "but a common carrier for hire by special contract, though based on a valuable consideration, cannot exempt himself from loss or damage which has in any degree been caused by his own negligence or that of his servants. . . . . Exemptions from responsibility arising from loss occasioned in any degree by the negligence of the common carrier or his servants are not just and reasonable."

§ 140. In Wisconsin it was held in 1882 well settled that a carrier of persons or property cannot by any agreement however plain and explicit, wholly relieve himself from responding in damages when the injury is the result of gross negligence or fraud.[3] It is competent for a common carrier by express contract to limit his liability in all respects with reference to the transportation of live stock.[4] In 1865 a carrier's right to limit his liability to his own line was declared, but the right to limit his liability upon his own line was left undetermined.[5] In 1866 it was held that an express company might lawfully limit its liability as insurer by contract, as to losses arising through the default or negligence of any other person, corporation or asso-

[1] B. & O. R. R. Co. *v.* Rathbone, 1 West Virginia, 87.

[2] 14 W. Va. Reps. 180; opinion by Green, P., distinctly overruling B. & O. R. R. Co. *v.* Rathbone, *supra*. See also Brown *v.* Adams Ex. Co., 15 W. Va. 812; B. & O. R. R. Co. Skeels, 3 W. Va. 556.

[3] Black *v.* Goodrich Trans. Co. 55 Wis. 319.

[4] Morrison *v.* P. & C. Construction Co., 44 Wis. 405.

[5] D. & M. R. R. Co. *v.* F. & M. Bank, 20 Wis. 122.

ciation to whom the property entrusted to it should be delivered by the company for the performance of any act or duty in respect thereto at any point or place off the established routes or lines of the company, and might free itself from liability for any loss or damage of any box or package for over $50 unless the just and true value be stated in the receipt; or for property not properly packed or fragile fabrics not so marked upon the package or fabrics consisting of or contained in glass. "The conditions of this receipt," said the Court, "do not involve the much vexed question as to whether a common carrier can protect himself by contract from liability for losses occurring through his own negligence or misconduct or the negligence or misconduct of his own agents or servants." During the same year a contract that the owner of *live stock* would assume all risk of damage or injury from whatever cause happening in the course of transportation was held to be valid. The Chief Justice was however careful to say: "We intimate no opinion as to whether it is or is not competent for a common carrier to make stipulations with regard to other kinds of property, or so as to protect himself against loss or damage arising from his own negligence or the negligence or omissions of his agents or servants."[1] This question therefore remains undetermined in Wisconsin. It has, however, been said by the court:

"We do not understand however that when a railroad company by its agent agrees to deliver goods within a prescribed time, it becomes an absolute insurer of the goods and must deliver at all events or pay for the property. We suppose if the goods were destroyed by an act of God or the public enemy before the time for delivering them expired this would excuse the carrier on the special contract. The parties are presumed to contract with reference to the responsibility which the common law imposes upon the carrier in ordinary cases,—the carrier assuming the risk with respect to the time. Such it seems to us is the extent of liability assumed by the special agreement. And with this understanding as to the meaning and obligation of the time contract alleged to have been made, we think the County Court was correct in holding that it was within the

[1] Betts *v.* Farmers' Loan & Trust Co., 21 Wis. 80.

scope of the employment and duty of the agent to make it binding on the company."

§ 141. From this examination of the decisions of the American Courts it appears that the general rule is that carriers may limit their common law liability by special contract but public policy forbids that they should be permitted to contract for exemption from liability for loss or injury attributable to their own or their servant's negligence. To this general rule exceptions are found in the law of New York, of Iowa, of West Virginia and of Texas.[1]

[1] Strom *v.* D. & M. R. R. Co., 23 Wis. 126.

CHAPTER IX.

LIMITATION OF LIABILITY TO A SPECIFIC SUM.

Limitation of liability to a specific amount by notice and advertisement, § 142.
Such notice is obligatory because intended to insure good faith, § 143.
Limitation of liability to a specific amount by the terms of the bill of lading, § 144.
Benefit of the limitation to carriers other than the one giving the bill, § 145.
Effect of limitation where the shipper is silent as to the real value, § 146.
Effect of limitation where several articles are included in one package, § 147.
Construction put upon limitation in Alabama case, § 148.
Limitation does not relieve from liability for negligence, § 149.

§ 142. When goods are tendered for shipment the shipper is frequently met by notice from the carrier that the latter will not be liable beyond a particular amount if the true value of the goods be not declared by the shipper. This intention of the carrier to restrict his liability may be brought to the actual or constructive knowledge of the shipper by advertisement, by posting of placards, or by a clause contained in the bill of lading under which the goods are carried. If notice of such an intention on the part of the carrier be brought home to the knowledge of the shipper it becomes the duty of the latter to inform the carrier of the true value of the goods or he will be bound by the limitation of liability reserved by the carrier. The notice becomes in effect the same as if the shipper were directly interrogated as to the value of his goods, for the carrier may by notice demand information as to the nature and value of property to be carried. There is some disagreement among the cases as to whether the carrier can so restrict his liability by a mere notice or even by a stipulation in his receipt for the goods. Some of the Courts have decided that he cannot;[1] some that he can do so.[2]

[1] Southern Ex. Co. *v.* Armstead, 50 Ala. 350; Adams Ex. Co. *v.* Stettaners, 61 Ill. 184; Southern Ex. Co. *v.* Crook, 44 Ala. 468.

[2] Brehme *v.* Adams Ex. Co., 25 Md. 328; Kallman *v.* U. S. Ex. Co., 3 Kan. 205.

§ 143. A distinction exists between the effect of those notices by a carrier which seek to discharge him from duties which the law has annexed to his employment and those designed simply to insure good faith and fair dealing on the part of his employer. In the former case, notice alone is not effectual without an assent to the attempted restriction. In the latter, notice alone, if brought home to the knowledge of the owner of the property delivered for carriage, will be sufficient. Of the latter class is a stipulation in a carrier's receipt that its liability shall not exceed $50 unless the goods shipped were valued.[1]

§ 144. Bills of lading (particularly those of express companies) frequently contain a clause limiting the carrier's liability to a particular amount in case of loss. This is sometimes made dependent on the shipper's failure to state the value of the goods shipped.

A bill of lading is, however, a special contract for carriage and it is well settled that the carrier may by special contract limit his liability to a specific amount if he be not truthfully informed of the value of the goods;[2] but it would seem that the restriction of liability is inoperative if the goods are lost or injured by reason of the negligence of the carrier.[3]

§ 145. A carrier cannot take advantage of a clause in a receipt given by another carrier and to which he is not a party, containing a restriction of liability to a certain sum, unless the property be expressly otherwise valued or specially insured.[4]

[1] Oppenheimer *v.* U. S. Express Co., 69 Ill. 62.

[2] S. & N. A. R. R. Co. *v.* Henlein, 52 Ala. 606; Muser *v.* Am. Ex. Co., 1 Fed. Rep. (U. S. C. C.) 382; Boorman *v.* Am. Ex. Co., 21 Wisc. 152; Southern Ex. Co. *v.* Crook, 44 Ala. 468; Brehme *v.* Adams Ex. Co., 25 Md. 328; Skipwith *v.* Great West. R. Co., 59 L. T. N. S. 520.

[3] U. S. Ex. Co. *v.* Backman, 28 Ohio St. 144; Unnevehr *v.* Stm. Hindoo, 1 Fed. Rep. 627; Boscowitz *v.* Adams Ex. Co., 93 Ill. 523; Magnin *v.* Dinsmore, 56 N. Y. 168; Am. Ex. Co. *v.* Sands, 55 Pa. St. 140; Vroman *v.* A. M. W. Ex. Co., 5 N. Y. S. C. 22; Southern Ex. Co. *v.* Crook, 44 Ala. 468; Erie Dispatch *v.* Jackson, 87 Tenn. 490; Louisville, etc., R. Co. *v.* Sherrod, 84 Ala. 178; St. Louis, etc., R. Co. *v.* Weakly, 50 Ark. 397.

[4] Newberger *v.* Howard & Co.'s Express, 6 Phila. 174; Martin *v.* Am. Express Co., 19 Wis. 336.

§ 146. Where, under a contract by which the carrier's liability was limited to $50, unless value was stated by the shipper and no statement of value was asked or made, it was held that the silence of the shipper as to the real value, though there was no inquiry and no artifice was used to conceal it, was a legal fraud on the carrier and discharged him from liability for mere ordinary negligence unaccompanied by wilful misfeasance, for responsibility for which, disclosure was a condition precedent. The carrier's omission to make inquiry as to the value is not a waiver of the limitation.[1]

§ 147. Where three cases of pills were wrapped up in a single package and two of them were lost, the bill of lading limiting the carrier's liability to $50 upon the "article forwarded," it was held that the article forwarded was the single package and the shipper was not entitled to recover $50 upon each of the missing cases.[2]

§ 148. In Alabama the carrier's liability may be limited to a certain amount in case of loss, by special contract, but not by mere general notices. There must be special stipulations signed by the party owning the goods and the stipulations must be also in the opinion of the Court before whom the case is tried, just and reasonable. If the size or appearance of the package indicates its value to be greater than the sum named, the carrier will be presumed to waive the necessity of stating value, unless the shipper's attention is called to the conditions and he is required to give the value. As to bales of cotton the carrier can see for himself and generally knows their value as well as the shipper.[3]

§ 149. Carriers cannot by contract legally stipulate for a partial any more than for a total exemption from liability for negligence and it makes no difference that in consideration of the limited liability the carrier undertook the transportation for a reduced compensation. A clause limiting the value of certain goods to $20 was held to be void and damages were estimated on the basis of the real value of the goods.[4]

[1] Magnin *v.* Dinsmore, 70 N. Y. 410; Same *v.* Same, 62 ib. 35.

[2] Wetzell *v.* Dinsmore, 54 N. Y. 496.

[3] Southern Express Co. *v.* Crook, 44 Ala. 468.

[4] U. S. Express Co. *v.* Bachman, 28 Ohio State, 144.

CHAPTER X.

ACCEPTANCE OF THE BILL IS ASSENT TO ITS TERMS.

Acceptance of the bill by the shipper is generally held to be an assent to its terms, § 150.
Duty of the shipper to read the bill, § 151.
In Massachusetts assent must be proven, § 152.
So also in Illinois, § 153.
Statutory enactment in Dakota, § 154.
The rule in Georgia, Michigan, Maryland, § 155.
The rule in Ohio, § 156.
Assent is not presumed as to limitations indorsed on the bill, § 157.
Assent is presumed where the shipper is familiar with the terms, § 158.

§ 150. The bill of lading, as we have seen, is signed only by the carrier, or by some one on his behalf, and is usually handed to the shipper on the delivery of the goods to the carrier. Where a shipper with full knowledge of the contents of the bill of lading, assents to it and accepts its terms, it is of course a binding contract; defines the rights and liabilities of the parties[1] and cannot be contradicted by parol proof.[2]

If the circumstances are such as to charge him with knowledge, as where the bill is printed or made out by himself, his assent will be presumed,[3] but where, as is generally the case, the bill of lading is simply handed to the shipper, without anything further being done, the law differs in the several States, as to whether or not his receipt of the bill is an acceptance of its terms and conditions. In most of the States, in the absence of fraud, deceit, or mistake, acceptance is conclusive evidence of assent.[4] The reason for this is well-stated by Mr. Justice

[1] M. D. T. Co. *v.* Leyser, 89 Ill. 43; U. S. Exp. Co. *v.* Haines, 67 ib. 137; Anchor Line *v.* Knowles, 66 ib. 150; Falkenau *v.* Fargo, 3 Jones & Sp. (N. Y. Supr. Ct.) 332.

[2] C. H. & D. & M. R. Co. *v.* Pontius, 19 Ohio St. 221.

[3] Lawrence *v.* N. P. B. R. R. Co., 36 Conn. 63.

[4] Steele *v.* Townsend, 37 Ala. 247; The Emily *v.* Karney, 5 Kansas, 645; Mulligan *v.* Illinois R. R. Co., 36 Iowa, 181; Robinson *v.* M. D. T. Co., 45 ib. 470; Grace *v.* Adams, 100 Mass. 505; Hoadley *v.* N. T. Co., 115 ib. 305; C. H. & D. M. R. R. *v.* Pontius, 19 Ohio St. 221; Huntingdon *v.* Dinsmore, 4

COOLEY in the case of McMillan *v.* Michigan R. R. Co.[1] He says: "Where a contract is to be signed only by one party the evidence of assent to its terms by the other party, consists usually in his receiving and acting upon it. This is the case with deeds poll and with various classes of familiar contracts and the evidence of assent derived from the acceptance of a contract without objection is commonly conclusive. I do not perceive that bills of lading stand upon any different footing."

§ 151. Again, the character of a bill of lading is such as to throw the shipper upon his guard when he receives it. Its office is to limit the carrier's liability and the shipper would necessarily expect conditions unfavorable to his own interests. It is therefore his duty to read it and he cannot take advantage of a failure to do so by pleading ignorance of its terms and want of assent thereto.[2] There may however be circumstances in which the shipper will be relieved from the duty of reading the bill. For example, where he is misled by the carrier as to the character of the instrument, as where he is told

Hun (N. Y.), 66; Brehme *v.* Adams Exp. Co., 25 Md. 328; Long *v.* N. Y. Cent. R. R. Co., 50 N. Y. 76; Snider *v.* Adams Exp. Co., 63 Mo. 376; Am., etc., Exp. Co. *v.* Schier, 55 Ill. 140; Dillard *v.* Louisville, etc., R. R. Co., 2 Lea (Tenn.), 288; E. T. V. & G. R. R. Co. *v.* Brumley, 5 ib. 401; Newberger *v.* Howard, 6 Phila. (Pa.) 174; Farnham *v* C. & A. R. R. Co., 55 ib. 53; Westheimer *v.* Penna. R. R. Co. 8 W. N. C. ib. 272; Bostwick *v.* B. & O. R. R. Co., 55 Barb. (N. Y.) 137; Maghee *v.* C. & A. R. R. Co., 45 ib. 514; Belger *v.* Dinsmore, 51 ib. 166; Soumet *v.* Nat. Exp. Co., 66 ib. 284; Degitz *v.* Holland, 6 Chicago Legal News, 224 (Marine Ct. N. Y.); Gibson *v.* Amer. Merch. Union Exp. Co., 3 N. Y. (S. C.) 501; Kirkland *v.* Dinsmore, 62 id. 171; reversing S. C., 8 Hun, 296; 4 T. & C. 304; Hill *v.* S. B. N. Y. R. R. Co., 73 ib. 351; reversing S. C. 8 Hun, 296; Germania F. I. Co. *v.* M. & C. R. R. Co., 72 ib. 90; Bishop *v.* E. T. Co., 48 How. Pr. 119; see also Newman *v.* Smoker, 25 La. Ann. 303; *contra*, Christenson *v.* Am. Exp. Co., 15 Minn. 270; Chouteaux *v.* Leech, 6 Harris (Pa.), 224; Draysen *v.* Horne, 32 L. T. N. S. 691; 23 W. R. 793; The Delaware, 14 Wallace, 579; Ayers *v.* Western T. Co., 14 Blatchford (C. C.), 9; Sunderland *v.* Westcott, 2 Sweeney (N. Y. Supr. Ct.), 260.

[1] 16 Mich. 79.

[2] Bostwick *v.* B. & O. R. R. Co., 55 Barbour, 137; Kirkland *v.* Dinsmore, 62 N. Y. 171; Hill *v.* S. B. & N. Y. R. R Co., 73 ib. 351; Grace *v.* Adams, 100 Mass. 505; O'Bryan *v.* Kinney, 74 Mo. 125; Snider *v.* Adams Exp. Co., 63 ib. 376; O'Rourke *v.* Ry. Co., 23 W. C. Q. B. 427.

by the carrier's agent that it is a mere receipt,[1] or where it is given to him in answer to his demand for a "receipt."[2] Or, if the circumstances of the case are such as to put the shipper off his guard and to lead him to the belief that the instrument is not a bill of lading, as in the cases where the contract of carriage had been already made by a prior parol agreement and the bill of lading is given to the shipper afterwards and he supposes it to be a mere receipt;[3] or where the circumstances are such that he may well have presumed that the bill of lading would not differ in terms from those previously understood;[4] or where the goods are already out of the shipper's power and he objects to the proposed limitation;[5] or if the limitations of the carrier's liability are inserted in such a manner as not to attract the attention of the shipper,[6] as if they are printed in type so small as to be inconspicuous[7] or illegible.[8] In Fibel *v.* Livingston,[9] however, a receipt was held a contract, although taken by a foreigner ignorant of the language in which it was printed and to whom no explanation of its terms was vouchsafed.

In some of the states a different rule, however, prevails. In Wisconsin, possession by a shipper of a receipt restricting the liability of the carrier is only *prima facie* evidence of his assent to the restrictions and may be contradicted by parol evidence. If it appeared that he examined the receipt and knew its con-

[1] Simmons *v.* G. W. Ry. Co., 2 C. B. N. S. 620.

[2] Kirkland *v.* Dinsmore, 4 N. Y. S. C. 304; Woodruff *v.* Sherrard, 9 Hun (N. Y.), 322.

[3] Bostwick *v.* B. & O. R. R. Co., 45 ib. 712; King *v.* Woodbridge, 34 Ver. 565; Missouri Pac. Ry. *v.* Beeson, 30 Kans. 298; Strohn *v.* D. & M. R. R. Co., 21 Wis. 554; but see Swift *v.* Pac. Mail St. Co., 106 N. Y. 206; Blossom *v.* Dodd, 43 ib. 264; Madan *v.* Sherrard, 42 N. Y. Supr. Ct. Rep. 353; Woodburn *v.* Railroad Co., 40 Fed. Rep. 731; Germania F. I. Co. *v.* M. C. R. R. 7 Hun (N. Y.), 233; S. C. 72 ib. 90; Bostwick *v.* B. & O. R. R. Co., 55 Barb. 137.

[4] Buckland *v.* Adams Exp. Co., 97 Mass. 124; Perry *v.* Thompson, 98 ib. 249.

[5] Bostwick *v.* B. & O. R. R. Co., 45 N. Y. 712.

[6] Cooley, J., in McMillan *v.* Mich. R. Co., 16 Mich. 79.

[7] Verner *v.* Switzer, 8 Casey (Pa.), 208.

[8] Blossom *v.* Dodd, 43 N. Y. 264; Madan *v.* Sherrad, 73 ib. 329.

[9] 64 Barb. 179. See also Warhus *v.* Savings Bank, 21 N. Y. 543.

tents and did not offer to return it or give notice of his dissent, this would seem to be conclusive evidence of assent.[1]

§ 152. In Massachusetts assent must be shown. It is not necessarily to be inferred from knowledge by the shipper of the restrictions of liability. The evidence must go further and show that the terms on which the carrier proposed to carry the goods were adopted as the contract between the parties according to which the service was to be rendered.[2] In Perry *v.* Thompson,[3] it was held that no inference of consent to the limitations of the carrier's liability by the bill of lading could be drawn from continued use of the same printed form in former transactions between the same parties.

§ 153. In Illinois no presumption of the assent of the shipper to the terms of the bill of lading can arise from the mere receipt of it by him, or from notice to him of its contents. Assent must be affirmatively shown[4] and while it is not necessary that the shipper should sign[5] the bill, there must be express assent to its terms, or circumstances which clearly show assent. Assent is a question of fact for the jury to determine from all the circumstances attending the giving of the receipt.[6]

§ 154. In Dakota it is provided by statute that a consignor, by accepting a written contract for carriage with knowledge

[1] Boorman *v.* Am. Exp. Co., 21 Wis. 152; Strohn *v.* D. M. Ry. Co., ib. 554; Falvey *v.* N. T. Co., 15 ib. 129; The Sultana *v.* Chapman, 5 ib. 454; Morrison *v.* Phillips & Co., 44 ib. 405; White *v.* G. T. Co., 46 ib. 493. See also Detroit R. R. Co. *v.* Farmer's Bank, 20 ib. 127.

[2] Buckland *v.* Adams Ex. Co., 97 Mass. 124.

[3] 98 Mass. 249. See also Pratt *v.* O. and L. C. R. R. Co., 102 ib. 557. But see § 158 *post.*

[4] M. D. T. Co. *v.* Joesting, 89 Ill. 152; W. T. Co. *v.* Newhall, 24 ib. 466; Erie R. Co. *v.* Wilcox, 84 ib. 239.

[5] U. S. Ex. Co. *v.* Haines, 67 Ill. 137; M. D. T. Co. *v.* Leyser, 89 ib. 43; Anchor Line *v.* Knowles, 66 ib. 150; Anchor Line *v.* Dater, 68 ib. 368; Chicago, etc., R. Co. *v.* Montfort, 60 ib. 175; Ill. Cen. R. R. Co. *v.* Frankenberg, 54 ib. 88; Erie Ry. Co. *v.* Wilcox, 84 ib. 239.

[6] M. D. T. Co. *v.* Leyser, 89 Ill. 43; M. D. T. Co. *v.* Theilbar, 86 ib. 71; American Merc. Union Ex. Co. *v.* Schier, 55 ib. 140; Field *v.* Chicago, etc., Ry. Co., 71 ib. 458; Adams Ex. Co. *v.* Haynes, 42 ib. 89; Ill. Cen. R. R. Co. *v.* Frankenberg, 54 ib. 88; Chicago, etc., R. Co. *v.* Montfort, 60 ib. 175; Boscowitz *v.* Adams Ex. Co., 93 ib. 523; Anchor Line *v.* Dater, 61 ib. 369; Adams Ex. Co. *v.* Stettaners, 61 ib. 184. See also legislation on this point in Illinois.

of its terms, assents to the rate of hire and the time, place and manner of delivery therein stated, but that his assent to any other modification of the carrier's obligation contained in such instrument can only be manifested by his signature thereto.[1]

§ 155. In Maryland,[2] Georgia[3] and Michigan,[4] agreement to the terms of the bill of lading must be proven by the carrier, and cannot be presumed from acceptance of special rates of freight. So in Mississippi,[5] where, if it is merely doubtful whether the consignor intended to waive her legal rights, it was held that public policy requires they should be presumed and upheld.[6]

§ 156. In Gaines *v.* U. T. Co.[7] the court of Ohio held that the principles of the law which create obligations *ex contractu* by an implied promise or constructive assent have no application to the contracts limiting the liability of a common carrier. To such limitation there must be express assent. Every intendment should be made in favor of the shipper where he takes a receipt for his property with restrictive conditions annexed and says nothing, that he intends to rely upon the law for the security of his rights. There must be evidence of the shipper's assent else the presumption is that he relies on his common law rights. The question of assent is entirely one of fact for the jury.

§ 157. A limitation of a carrier's liability contained in a notice indorsed on a bill of lading is held, in the Federal Courts, to be no part of the contract and is of no avail in varying the shipper's rights,[8] and in Western Transp. Co. *v.* Newhall,[9] the

[1] Dak. T. Civ. Code, § 1263; Hartwell *v.* North Pacif. Exp. Co., 5 Dak. T. 463.

[2] B. & O. R. R. Co. *v.* Brady, 32 Md. 333; McCoy *v.* E. & W. T. Co., 42 ib. 498.

[3] Wallace *v.* Sanders, 42 Ga. 486.

[4] Am. Trans. Co. *v.* Moore (S. C. Mich.) 7 Am. Law Reg. O. S. 352; M. C. R. R. Co. *v.* Hale, 6 Mich. 257; Hartness *v.* G. W. R. Co., 2 Brown (Mich.), 80. But see McMillan *v.* Michigan Ry. Co., 16 Mich. 79.

[5] Mobile & Ohio R. R. Co. *v.* Weiner, 49 Miss. 725.

[6] South. Ex. Co. *v.* Moon, 10 George (Miss.), 822.

[7] 28 Ohio State, 418; P. C. & St. L. R. R. Co. *v.* Barrett, 36 ib. 448.

[8] Brittan *v.* Barnaby, 21 How. (U. S. C. C.) 527; Ormsby *v.* U. P. R. R. Co., 4 Fed. Rep. (U. S. C. C.) 706; Ayers *v.* West. R. Co., 14 Blatchford (U. S. C. C.), 9.

[9] 24 Ill. 466; R. R. Co. *v.* Mf. Co., 16 Wall. 318.

Court of Illinois hold that there is no distinction between such a notice and one printed in newspapers or by handbills and that a notice indorsed on the receipt forms no part of the contract. The rule in regard to notices indorsed on the bill of lading is the same in New York.[1] Where, however, the bill of lading refers in plain terms to the conditions indorsed upon it, the shipper, if he assented to the former, will be bound by the latter,[2] especially where there is evidence *aliunde* showing his assent.[3]

§ 158. The use of the same form of bill of lading in several transactions by the shipper is good evidence of knowledge of its terms[4] and presumption of assent thereto.[5] So is the fact that the owner of goods by himself or his clerk filled up the receipt.[6]

[1] Limburger *v.* Westcott, 49 Barb. (N. Y.) 283; Sunderland *v.* Westcott, 2 Sweeney (N. Y. S. C.), 260.

[2] D. & M. R. R. Co. *v.* Farmer's Bank, 20 Wis. 122; Mayer *v.* G. T. R. Co., 31 U. C. C. P. 248.

[3] Hartness *v.* G. W. Ry. Co., 2 Brown (Mich.), 80. See also Falkenberg *v.* Clark, 11 R. I. 279.

[4] E. W. T. Co. *v.* Dater, 91 Ill. 195.

[5] M. D. T. Co. *v.* Moore, 88 Ill. 136.

[6] Boscowitz *v.* Adams Ex. Co., 93 Ill. 523; and see U. S. Ex. Co. *v.* Haines, 67 ib. 137.

CHAPTER XI.

EXECUTION OR ACCEPTANCE OF THE BILL BY AN AGENT OF THE SHIPPER, OR OF THE CARRIER.

Authority of an agent, delivering goods to the carrier, to bind the shipper, § 159.
Knowledge of an authorized agent as to manner of shipping, is the knowledge of the shipper, § 160.
Rule in those states where assent to terms must be shown, § 161.
Contract made by an agent in his own name benefits the real owner, § 162.
A principal must adopt his agent's contract as a whole, § 163.
Carrier having dealt with an agent cannot deny such agent's authority, § 164.
Where goods are shipped by a vendor or by an agent of the consignee, § 165.
Bill executed by an agent of the carrier, § 166.
Agent not authorized to sign bills for goods not actually received and such bills are void, § 167.
Contrary rule obtains in certain courts, § 168.
Agent of the carrier must be duly authorized to sign bills, § 169.
Who are authorized, § 170.
Who are not authorized, § 171.
Instructions to carrier's agent do not bind the shipper, § 172.
Effect of an agent's agreement to make immediate delivery, § 173.
Limitations of agent's power to make a special contract, § 174.

§ 159. A CONTRACT with an agent about the business to which the agency relates is a contract with the principal and its validity is not affected by a limitation of the agent's authority of which the other contracting party had no notice.[1] Therefore, a carrier who receives goods is not required to investigate the authority of the person shipping them to make a contract limiting the carrier's liability[2] and the general rule may be stated to be that the agent of a shipper has power to make a special contract with a common carrier limiting the latter's responsibility.[3] The rule is based on the principle that an order to an agent to deliver goods to a carrier for transportation, includes all the necessary and usual means of carrying it into effect. It

[1] Chouteaux *v.* Leech, 18 Pa. St. 224.

[2] Moriarity *v.* Harnden's Exp., 1 Daly (N. Y.), 227.

[3] Knell *v.* U. S. & Brazil S. S. Co., 1 Jones & Spencer (33 N. Y. Supr. Ct.), 423.

can be executed only by obtaining the consent of the carrier to receive them and the agent therefore is authorized to stipulate for terms of transportation.[1] It is not necessary for the carrier to prove an express power in the shipping agent. It is enough if it appears that the agent had before done such acts, or had occupied such a position in the employ of the shipper as usually entitles the incumbent to perform such acts.[2]

§ 160. Knowledge by the shipper's agent, gained in the transaction of the duty delegated to him, is knowledge by his principal. Therefore, where an agent is present at the time of shipment and sees that the goods must necessarily be exposed to the rain and mud, the carrier will not be liable for damage so suffered.[3] On the other hand the shipper will not be bound by private knowledge of his agent, of which the shipper himself is ignorant.[4]

§ 161. In those states, however, in which the assent of the shipper to limitations of the liability of the carrier by the terms of the bill of lading must be affirmatively shown by the carrier, the knowledge and assent of the agent of the shipper to the terms of the bill of lading are not enough to free the carrier from liability and a drayman entrusted by a shipper with the delivery of the goods to a carrier was held to be a mere bailee for hire to take the package to the wharf and obtain a receipt.[5]

§ 162. The fact that a contract of carriage is made with the carrier by a mere agent in his own name, without disclosing

[1] Nelson *v.* H. R. R. R. Co., 48 N. Y. 498; Thompson *v.* Fargo, 63 N. Y. (Ct. of App.) 479; McCann *v.* B. & O. R. R. Co., 20 Md. 202; Pecks *v.* Dinsmore, 4 Porter (Ala.), 212; York Co. *v.* Central R. R., 3 Wall. 107; Grace *v.* Adams, 100 Mass. 505; Squire *v.* N. Y. C. R. R. Co., 98 Mass. 239; Mayhew *v.* Eames, 3 B. & C. 601; Merchant's Dispatch Co. *v.* Joesting, 89 Ill. 152.

[2] Dows *v.* Greene, 16 Barbour (N. Y.), 72.

[3] Newman *v.* Smoker, 25 La. Am. Rep. 303; Berry *v.* Cooper, 28 Ga. 543.

[4] Berry *v.* Cooper, 28 Ga. 543; Beau *v.* Green, 12 Me. 422.

[5] Falvey *v.* N. T. Co., 15 Wis. 129; The Pacific, Deady (D. C.), 17; M. D. T. Co. *v.* Joesting, 89 Ill. 152; Buckland *v.* Adams Exp. Co., 97 Mass. 124; Gaines *v.* Un. T. Co., 28 Ohio, 418; Am. Trans. Co. *v.* Moore, 5 Mich. 368.

his principal, does not deprive the owner of the goods of his action against the carrier for a breach of the contract. For example, where a railroad company takes a bill of lading in its own name for goods shipped by A., the company is A.'s agent and the contract inures to his benefit.[1]

§ 163. Where, however, a shipper adopts a contract made by his agent containing certain restrictions of liability, which the agent had no authority to make, he must adopt it entirely and cannot adopt a part and repudiate a part. Where he sues upon the contract he must abide by its terms.[2] Where a shipper's agent contracts without authority with several carriers, all of whom are liable, the shipper having, by bringing suit against one, adopted the contract with him, cannot recover against the others. Thus, where A. contracts for the carriage of certain goods with B., who without the knowledge or direction of A. contracts with C. for their carriage, who also without the knowledge of A. contracts with D., who loses them, then A. can recover from D., but having chosen to sue D. cannot after that recover from B. or C.[3]

§ 164. On the other hand, a common carrier, after contracting with a party as the agent of a consignor, cannot afterward deny such agent's authority as against such consignor.[4]

§ 165. Where the consignor, who is the vendor[5] or the bailee of goods,[6] or a forwarding carrier,[7] ships goods at the direction of the consignee of said goods, he acts as the agent of the consignee for the purpose of obtaining transportation and as such has authority to make such a contract with the carrier as in the honest exercise of his discretion he sees fit.[8] Where,

[1] Ames *v.* St. P. & P. R. R. Co., 12 Minn. 412; Patterson *v.* Clyde, 67 Pa. St. 500; N. J. S. N. Co. *v.* Merchants' Bk., 6 How. 344.

[2] Southern Express Co. *v.* Palmer, 48 Ga. 85; N. J. Steam Nav. Co. *v.* Merchants' Bank, 6 Howard, 344.

[3] Sanderson *v.* Lamberton, 6 Binney (Pa.), 128.

[4] Baker *v.* Steamboat Milwaukee, 14 Iowa, 214.

[5] Wiggins *v.* Erie R. R. Co., 5 Hun (N. Y.), 185; Gordon *v.* Ward, 16 Mich. 360.

[6] Soumet *v.* Nat. Exp. Co., 66 Barb. 284; Squire *v.* N. Y. C. R. R., 98 Mass. 239.

[7] Patterson *v.* Clyde, 67 Pa. St. 500.

[8] Soumet *v.* Nat. Exp. Co., 66 Barb. 284; Shelton *v.* M. D. T. Co., 59 N. Y. 258; Robinson *v.* M. D. T. Co., 45 Iowa, 470; Adams *v.* Crosby, 2 Nov. Scot. Law Rep. (R. & G.)

however, there has been a previous contract between the consignee and the carrier, the consignor, acting as the agent of the consignee, has no authority to vary that contract.[1] One who forwards goods in execution of an order or agreement for sale is not a mere agent of the purchaser in so doing. He is acting in his own interest and his dealings with the carrier are in his own right and upon his own responsibility. He may enforce the contract of the carrier and inferentially he may contract for the transportation in any manner he pleases.[2]

§ 166. A common carrier, whether by water or rail, is bound by all the acts of, or contracts made by, its agents within the scope of their authority and by the knowledge of its agents attained in the course of the transaction.[3] Carrier's agents are therefore authorized to sign and issue bills of lading[4] and in the absence of fraud or imposition the receipt so delivered to the shipper must be held to be the contract between the parties.[5]

§ 167. The agent's authority is subject to the important limitation, of which the public is held to have notice that he is only authorized to issue bills of lading for goods actually received.[6] A bill of lading issued for goods which have never been placed in the possession of the carrier is absolutely void, even in the hands of one who has advanced money upon it in good faith and without notice.[7]

331. *Contra*, Amer. Trans. Co. *v.* Moore, 5 Mich. 368, where the authority of the vendor in any particular case to contract on behalf of the consignee is said to be a question of fact for the jury. *Contra*, also, in *Illinois*, where the affirmative consent of the shipper is always required to any contract limiting the carrier's liability. M. D. T. Co. *v.* Joesting, 89 Ill. 152; and see bill of lading executed by shipper's agent, *supra*.

[1] Wiggins *v.* Erie R. R. Co., 5 Hun (N. Y.), 185.

[2] Finn *v.* West. R. R. Corp., 112 Mass. 524.

[3] Harmon *v.* N. Y. & E. R. R. Co., 28 Barbour, 323, and cases cited below.

[4] Rawes *v.* Deshler, 3 Keys, 572; Putnam *v.* Tillotson, 13 Met. 517.

[5] Huntingdon *v.* Dinsmore, 4 Hun (N. Y.), 66; Scoville *v.* Griffith, 12 N. Y. (Ct. of App.) 509.

[6] Union, etc., R. R. Co. *v.* Yeager, 34 Ind. 1; Hall *v.* Mayo, 7 Allen, 454; Ryder *v.* Hall, ib. 456; B. & O. R. R. Co. *v.* Wilkins, 44 Md. 11; Dean *v.* King, 22 Oh. St. 119; Sears *v.* Wingate, 3 Allen, 103; Oliver *v.* G. W. R. Co, 28 U. C. C. P. Rep. 143; Kirkman *v.* Bowman, 8 Robinson (La.), 246; The Lady Franklin, 8 Wallace, 325.

[7] Friedlander *v.* Texas, etc., R. R. Co., 130 U. S. 424; Robinson *v.* Memphis, etc., R. R. Co., 9 Fed. R.

§ 168. A contrary rule is established in New York,[1] Pennsylvania,[2] Kansas[3] and Nebraska[4] and the recent English case of Coventry *v.* G. E. R. Co.[5] seems to be in conflict with the earlier English cases.

§ 169. In order to be binding upon the carrier, the bill of lading must be issued by one who is the agent of the company, duly authorized and empowered to act in that capacity.[6] The question of agency is one for the jury to decide[7] but the agency may be inferred from the adoption by the company or its officers of the agent's acts, either expressly[8] or impliedly, as, where the officers of the company knew that the alleged agent acted as such and made no objection. In such a case the carrier will be bound by the act of the agent.[9] Where the company has been in the habit of allowing the agent to make contracts which would otherwise be in excess of his authority, it will be estopped from denying the agent's authority[10] and where the carrier has taken advantage of the contract made with the shipper by the carrier's agent, it cannot repudiate the contract on the ground that the agent had no authority to make it.[11]

129; Stollenwerck *v.* Thacher, 115 Mass. 224; Saltus *v.* Everett, 20 Wend. 268; La. Nat. Bank of N. O. *v.* Laveille, 52 Mo. 380; Hunt *v.* Miss. Cent. R. R. Co., 29 La. Ann. Rep. 446; B. & O. R. R. Co. *v.* Wilkins, 44 Md. 11; Erb *v.* G. W. R. R. Co., 5 Duval (Canada S. C.), 179; affirming 3 Tupper (Cent. App.), 456; Tiedman *v.* Knox, 53 Md. 612; Williams *v.* M. & W. R. Co., 93 N. C. 42; Pollard *v.* Vinton, 105 U. S. 7; Grant *v.* Norway, 2 Eng. L. & Eq. 337; The Schooner Freeman *v.* Buckingham, 18 How. 182; Hubbersty *v.* Ward, 8 Exch. 330; Jessel *v.* Bath, L. R. 2 Exch. 267; The Loon, 7 Blatch. C. C. Rep. 244; La. Nat. Bank *v.* Laveille, 52 Mo. 380; Thorman *v.* Burt, 54 Law Times (U. S.), 349; Coleman *v.* Riches, 29 Eng. L. & Eq. 323.

[1] Armour *v.* R. R. Co., 65 N. Y. 111; Bank of Batavia *v.* New York, Lake Erie & Western R. Co., 106 N. Y. 195.

[2] Brooke *v.* N. Y., etc., R. Co., 108 Pa. St. 529.

[3] Savings Bank *v.* R. Co., 20 Kansas, 519.

[4] Sioux City R. Co. *v.* First Nat. Bank, 10 Neb. 556.

[5] Coventry *v.* G. E. R. Co., 11 Q. B. D. 776.

[6] Thurman *v.* Wells, Fargo & Co., 18 Barbour (N. Y.), 500.

[7] Putnam *v.* Tiltotson, 18 Metc (54 Mass.) 517.

[8] Pendall *v.* Rench, 4 McLean, 259.

[9] A. & T. R. R. Co. *v.* Kidd, 29 Ala. 221.

[10] Knapp *v.* U. S. & Canada Express Co., 55 N. H. 348; Hosea *v.* McCrory, 12 Ala. 349.

[11] Wabash & Western R. R. Co. *v.* Elliott, 76 Ill. 67.

§ 170. One who is held out to the public as the agent of the carrier is capable of making any contract in regard to the transportation of the goods that the company is able to make. If a person who deals with a common carrier has a right, from the general mode of conducting the company's business, to rely upon the authority of one of its clerks to make a general contract for the goods, he has a right also to infer that such authority includes a power to contract to forward in a particular way.[1] For example, station agents are presumed to have power to contract for their principals for transportation of freight.[2] A depot agent of a railroad company, who receives and forwards freight, can contract for that purpose on behalf of the company.[3] The keeper of a coach office, who is part owner of the coaches, may bind all the owners by a contract for its support.[4] The second clerk of the carrier's boat can bind his employer.[5] So also can one whose name is printed on the bill of lading as the carrier's transportation agent[6] and one who keeps the keys of a car chartered by the shipper.[7]

§ 171. One, however, who casually happens to be the driver of a wagon, who has never before made a contract for transportation and who was particularly instructed not to take any goods for transportation, cannot bind his employer[8] and the servant of one who has formerly been a common carrier, but who has abandoned the business, cannot bind his master where he has been expressly instructed not to take goods for transport.[9] Nor can the carrier be bound by the acts of the person to whom the agent, without authority, has delegated his powers.[10]

§ 172. A carrier can neither limit his liability upon contracts made by his agent, by secret instructions to the agent limiting

[1] Goodrich *v.* Thompson, 4 Rob. (N. Y.) 75; Rawles *v.* Deshler, 3 Keys (N. Y.), 572; Louisville, etc., R. Co. *v.* Gilbert, 12 S. W. Rep. 1018.

[2] Pruitt *v.* H. & St. Jo. R. R. Co., 62 Mo. 527.

[3] Watson *v.* M. & C. R. R. Co., 9 Heiskell (Tenn.), 255; Hansen *v.* Flint, etc., R. R. Co., 73 Wis. 346.

[4] Helsby *v.* Mears, 5 B. & C. 504.

[5] Kirkman *v.* Bowman, 8 Robinson (La.), 246.

[6] B. & P. S. Co. *v.* Brown, 54 Pa. St. 77.

[7] Cent. R. R. & B. Co. *v.* Anderson, 58 Ga. 393.

[8] Jenkins *v.* Picket, 9 Yerger (Tenn.), 480.

[9] Satterlee *v.* Groat, 1 Wendell (N. Y.), 272.

[10] Pendall *v.* Rench, 4 McLean, 259.

the latter's authority when the instructions are unknown to the shipper;[1] nor by a local custom of which the shipper has no knowledge.[2] The public cannot take notice of the limitations upon the agent's power, unless they are conveyed to it in such a manner as to authorize the inference that the shippers are apprised of such limitations.[3]

§ 173. As has been said, carrier's agents are not only authorized to receive goods upon a contract for transportation simply, but it is within the scope of their authority to make special contracts modifying the ordinary relations between the shipper and the carrier. Thus, express companies' and railroad companies' agents may contract to "collect on delivery,"[4] or to deliver in covered cars.[5]

§ 174. A contract for the immediate delivery of goods made by a station agent binds the company, although the agent had no control over the locomotive power of the road.[6] The sending forward of instructions was held to be within the general scope of the forwarder's business and it was to be presumed that his clerk had authority to make the contract.[7] If an agreement to transport goods in a certain time is within a reasonable time, then it is within the scope of the employment of the carrier's agent to make it and binding on the carrier, but a mere statement by such agent of the ordinary time of carriage, if honestly made, is not sufficient to show a time contract.[8] Nor is the mere promise of an agent, without additional consideration, to forward freight then *en route* by an earlier train than was usual, binding upon the carrier.[9]

§ 175. An agreement made by the ticket and passenger agent of a railroad to watch for the arrival of goods at one point and carry them to another, is not within the sphere of the agent's

[1] Walker *v.* Skipwith, Meigs (Tenn.), 502.

[2] Hutchins *v.* Ladd, 16 Mich. 493.

[3] Pruitt *v.* H. & St. Jo. R. R. Co., 62 Mo. 527.

[4] Am. Exp. Co. *v.* Lesem, 39 Ill. 312; Nimter *v.* Pacific R. R. Co., 41 Mo. 503.

[5] G. T. R. Co. *v.* Fitzgerald, 5 Duval (Canada), 204.

[6] Deming *v.* G. T. R. R. Co., 48 N. H. 455.

[7] Hutchings *v.* Ladd, 16 Mich. 493.

[8] Strohn *v.* D. & M. R. R. Co., 23 Wis. 126.

[9] Railroad Co. *v.* Reeves, 10 Wallace (U. S. S. C.), 176.

employment, inasmuch as a common carrier by rail is not bound by law to watch for the arrival of goods at the depots or wharves of other carriers and transport them to its own depots.[1] A mere station agent has no authority to contract for the carriage of goods beyond the line of the carrier,[2] nor from a station not on the regular route.[3] The governing officers alone have power to make such a contract.[4] An agent may not contract to receive payment for transportation on a credit to be given by the shipper on a demand against third persons. In such a case, where the agent makes a contract upon terms which he knows he has no authority to agree to, he makes himself personally responsible.[5]

[1] Taylor *v.* Chicago, N. W. Ry. Co., 74 Ill. 86.

[2] Burroughs *v.* N. & W. R. R. Co., 100 Mass. 26.

[3] Irwin *v.* N. Y. C. R. R Co., 59 N. Y. (S. C.) 473.

[4] Wart *v.* A. & S. R. R. Co., 5 Lansing (N. Y.), 475.

[5] Meech *v.* Smith, 7 Wend. (N.Y.) 315.

CHAPTER XII.

BILL OF LADING EXECUTED BY THE MASTER OF A VESSEL.

Authority of the master to sign bills of lading, § 176.
Contract must be within the scope of the master's authority, § 177.
Secret instructions to the master do not bind the shipper, § 178.
Master cannot sign bills for lower rate of freight than the ship-owner contracted for, § 179.
Master has no authority to sign bills for goods not received, § 180.
Effect of custom on this rule, § 181.
Authority of ship broker to sign bills, § 182.
Personal liability of the master under the bill of lading, § 183.

§ 176. It is presumed from the nature of his employment that the master of a vessel which is employed as a common carrier is authorized to make contracts for the carriage of freight.[1] The terms of a bill of lading, therefore, signed by the master, constitute the engagement or contract of the owner,[2] wholly irrespective of the question whether the master is the agent of the general or of the special owner.[3] It is not necessary that the bill should be signed in the name of the owners for, while it is the general rule that to make the principal personally liable on a written contract made by his agent it should be executed in his own name and appear to be his own contract, a bill of lading signed by the master in his own name in the usual course of the employment of the ship will bind the owner.[4] When he signs as master of the vessel he is regarded as signing as the agent of the owners.[5] It is not necessary that he should write himself down as "master" if in fact he fills that position, or if he is described in the body of the contract as the master.[6]

[1] Bell *v.* Wood, 1 Dana (Ky.), 146; Moseley *v.* Lord, 2 Conn. 389.

[2] Ferguson *v.* Cappeau, 6 Harris & Johnson (Md.), 394.

[3] Schr. Freeman *v.* Buckingham, 18 Howard, 182.

[4] McTyer *v.* Steele, 26 Ala. 487.

[5] Slark *v.* Broom, 7 La. Ann. Rep. 337.

[6] Fox *v.* Holt, 36 Conn. 558.

§ 177. The contract must, however, be executed in the usual course of business and it must be within the scope of the master's authority. The mere fact that a man is master of a vessel does not give him authority to take freight and sign bills of lading. Every vessel is not a common carrier and to bind the owners by a contract of affreightment the vessel must be engaged in the freighting business. The master, therefore, of a vessel which had been sent by the owner to carry a cargo on the latter's own account, cannot bind the owner by a bill of lading.[1] The authority of the master can be either express or implied from custom and the usual course of business, or from subsequent assent. The shipper has the right to infer that one occupying the position of master of a vessel engaged as a common carrier has the power to contract for the carriage of goods, in the absence of information to the contrary. The receipt of compensation for carriage on previous occasions for goods similarly shipped is strong evidence of the authority of the master to act as the carrier's agent.[2]

§ 178. Any secret instructions by the owner of which the shipper has no notice, inconsistent with the authority with which the master appears to be clothed, will not affect third persons[3] but the authority of the master is limited by the custom of the carrier where that custom is known to the shipper and the master cannot make the owner liable for the loss of money carried contrary to the custom and without the consent of the owner.[4] Where, however, a custom exists to carry a particular article (as money) a receipt by the master binds the owners and the latter are liable for the money if lost.[5]

§ 179. The master of a ship has no authority to sign bills of lading for a lower rate of freight than the owner has contracted for,[6] nor has he power under his general authority to draw bills of lading making the freight payable to any other than the

[1] Nichols *v.* De Wolf, 1 R. I. 277.

[2] Witbeck *v.* Schuyler, 44 Barbour (N. Y.), 469.

[3] Schooner Freeman *v.* Buckingham, 18 Howard, 182; Allen *v.* Sewall, 2 Wend. (N. Y.) 327.

[4] Chouteau *v.* St. Anthony, 11 Mo. 226.

[5] Hosea *v.* McCrory, 12 Ala. 349; Garey *v.* Meagher, 33 ib. 630.

[6] Pickernell *v.* Janberry, 3 F. & F. (C. P. Eng.) 217.

owner, as for example, to the agents of the charterers who have advanced money to the master for the ship's use.[1]

§ 180. The master of a ship is estopped as against a consignee who is not a party to the contract and as against a consignee of the bill of lading (when either has taken it for a valuable consideration upon the faith of the acknowledged agreements which it contains) to deny the truth of the statements to which he has given credit by his signature, so far as these statements relate to matters which are or ought to be within his knowledge. When he is acting within the limits of his authority the owners are estopped in like manner with him, but the master of a ship has no authority to sign a bill of lading for goods not actually put on board. Such an act would be a fraud on his part. Therefore the owner of a ship is not responsible to parties taking or dealing with or making advances on the faith of an instrument which is untruthful in this particular.[2] When a captain has signed bills of lading for a cargo that is actually on board his vessel his power is exhausted, he is *functus officio* and he has no right or power, by signing other bills for the same quantity of goods (no more being put on board) even though he suppose the first bills destroyed, to charge the owners.[3]

§ 181. Where by a custom bills of lading were signed by a master before the goods were received by the ship, it was held that the bills must be considered as conditional and only binding in the event of the goods being really delivered to the boat subsequently.[4] Where the bill of lading is signed by the

[1] Reynolds *v.* Jex, 7 B. & S. 86; 34 L. J. Q. B. 251.

[2] Grant *v.* Norway, 10 C. B. 665; Meyer *v.* Dresser, 16 C. B. N. S. 657; Zipsy *v.* Hill, Foster & Finlason, 573; Hubbersty *v.* Ward, 8 Exch. 330; 18 Eng. L. & Eq. 551; Coleman *v.* Riches, 16 C. B. 104; Schooner Freeman, 18 How. 187; Friedlander *v.* Texas, etc., R. R. Co., 130 U. S. 424; Bark Edwin, 1 Sprague, 477; The Loon, 7 Blatchford (C. C.), 244; Baltimore & Ohio R. R. Co. *v.* Wilkins, 44 Md. 11; Sears *v.* Wingate, 3 Allen (85 Mass.), 103; Fellows *v.* Steamer P. W. Powell, 16 La. Ann. Rep. 316; Fearn *v.* Richardson, 12 ib. 752: Hunt *v.* Miss. Cent. R. Co., 29 ib. 446; Kirkman *v.* Bowman, 8 Rob. (La.) 246; Beard *v.* Steele, 34 U. C. Q. B. 43; The Sarogossa, 2 Ben. 544.

[3] Hubbersty *v.* Ward, 8 Exch. 330; 22 L. J. Exch. 113; Tindal *v.* Taylor, 4 El. & Bl. 219.

[4] Fearn *v.* Richardson, 12 La. Ann. Rep. 752.

master prior to the shipping of the goods, the subsequent delivery of the goods to the ship, if clogged by a condition, will not bind the vessel. Thus, in the case of the "John K. Shaw,"[1] the master of a canal-boat signed a blank bill of lading for grain and gave it to the charterer, who filled it up and negotiated it. The grain was subsequently put on board under an agreement that the title should not pass to the charterer until it was paid for. The grain was not paid for and was delivered to the order of those who put it on board. The court held that the vessel was not liable to the holder of the bill of lading.

§ 182. A ship's broker at a foreign port has no authority to relieve the master from the duty of seeing to the accuracy of statements contained in the bill of lading which he presents to him for signature[2] and a bill of lading, signed by a ship's broker in a foreign port "by authority of the captain," is not conclusive against the ship's owners.[3]

§ 183. The master is personally liable upon all bills of lading which he has authority to make. It is said that the holder of a bill of lading has a remedy in admiralty against the master on his undertaking, or personally against the owners of the vessel, or against the vessel *in rem*, where the goods shipped on board are not delivered.[4] The master is also personally liable on all bills of lading made in excess of his authority, on the general principle that an agent renders himself personally liable where he makes a contract upon terms which he knows he has no authority to agree to, although the contract be made in the line of his business as agent.[5] The master's liability may be released by the shippers as in the case of Hall *v.* Ship Chaplain,[6] where a quantity of iron was delivered to the captain of a vessel for shipment. The shippers signed a paper in which they declared that, in consideration of the captain having signed their bills of lading without a clause for a part of the iron being a little rusty, they exonerated him from any loss arising from his so signing.

[1] 32 Fed. Rep. 491.

[2] Stumore *v.* Breen, L. R. 12 App. Cas. 698.

[3] Thorman *v.* Burt, 54 L. T. N. S. 349.

[4] Schr. Leonidas, Olcott (D. C. N. Y.), 12.

[5] Meech *v* Smith, 7 Wendell (N. Y.), 315; Bell *v.* Wood, 1 Dana (Ky.), 146.

[6] 9 Louisiana, 318.

CHAPTER XIII.

EXCEPTIONS—EXPRESSIO UNIUS EST EXCLUSIO ALTERIUS —ACT OF GOD.

Expressio unius, etc., §§ 184, 185.
Expressio unius, etc., case of Gage *v.* Tirrell, § 186.
Expressio unius, etc., general rule, § 187.
Act of God—Definitions, §§ 188, 189.
Act of God—Losses within the exception, §§ 190–191.
Act of God—Losses not within the exception, § 192.
Act of God, the proximate cause, § 193.
Act of God and negligence concurring, § 194.
Amount of care necessary, § 195.
Act of God and delay concurring, § 196.
Deviation and act of God concurring, §§ 197, 198.
Consent of shipper to deviation, § 199.
Duty to protect goods after damage by act of God, § 200.
Act of God—Inevitable accident, §§ 201, 202.

§ 184. A QUESTION of some importance in the construction of the terms of a bill of lading which contains certain specified exceptions to the carrier's liability, but omits those which the common law allows for his benefit (viz: the act of God and the public enemy), is whether the expressed exceptions do not exclude the implied ones in accordance with the maxim *expressio unius est exclusio alterius.*

In an early case in England the question was raised, but remained unanswered,—the cause never having proceeded to final judgment.[1] In the case of Scaife *v.* Tarrant,[2] the defendant

[1] In Bever *v.* Tomlinson, Easter Term, 36 Geo. III. (cited in Abbott on Shipping, Pt. IV., ch. vi., p. 386, 5th ed., and in Story on Bailments, § 550), the bill of lading contained an exception only of the perils of the sea and the goods were lost in consequence of the ship being struck by the vessel of an enemy during the time of war. It was doubted whether a loss so occasioned was within the meaning of this exception.

[2] 23 W. R. 469; 2 Cent. L. J. 383. On appeal, the judgment of the court

made a special contract to carry certain furniture from Paignton to Plymouth with "risk of breakages in transit." The goods were destroyed by fire during transit by rail. The defendant was not a common carrier. He undertook for one particular risk only and did not stipulate to be liable for anything else. The court decided that he could not be held liable for a loss by fire and that the general rules applied to this special contract made between the parties, viz: "*expressio unius est exclusio alterius*," and "*expressum facit cessare tacitum.*"

Where the carrier, under the terms of his contract, becomes the absolute insurer of goods during carriage, a loss occasioned by the act of God or the public enemy will not relieve him from liability, though he does not specially stipulate to be liable for such losses.[1] If, however, there is no warranty of safe delivery, he will not be liable for a loss by the act of God, even where he contracts to carry the goods, stipulating the "damage or deficiency in quantity specified, if any, to be deducted from charges by the consignees." In order to extend his liability for such a loss, there must be an express agreement, unequivocally and necessarily evincing that such was the intention of the parties.[2]

The parties are presumed to contract with reference to the responsibilities which the common law imposes upon the carrier in ordinary cases. If the goods were destroyed by the act of God or the public enemy before the time for delivering them expired (the carrier having agreed to deliver the goods within a prescribed time), this would excuse the carrier on his special contract.[3]

§ 185. In Fish *v.* Chapman,[4] a wagoner contracted to deliver certain packages "in good order and condition, unavoidable accidents only excepted." The court held that the exception of unavoidable accidents excluded all other exceptions and that if the goods had been destroyed by the public enemy he would

below was affirmed. 23 W. R. 840; 2 Cent. L. J. 605.

[1] Gaither *v.* Barnet, 2 Brevard (S. C.), p. 488.

[2] Price *v.* Hartshorne, 44 N. Y. 94.

[3] Strohm *v.* Detroit & Milwaukee R. R. Co., 23 Wis. 126.

[4] 2 Ga. 349.

have been liable. The defendant was held liable as a common carrier on his special contract. This case was decided, however, upon the ground that the accident which occasioned the loss (the upsetting of a wagon on a decayed bridge) was not an unavoidable accident.

In the application of this maxim much depends upon the intention of the parties and the law does not imply the exemption from liability where the circumstances show that the parties intended that it should not be implied. In Pennsylvania it has been held that these circumstances may be shown by parol evidence[1] and in Connecticut it has been said that common carriers are not liable for losses by the act of God whether the bill of lading contains any exception of them or not.[2]

§ 186. This subject has been elaborately discussed in the case of Gage *v.* Tirrel.[3] In that case perils of the sea were specially excepted and it was attempted to hold the carrier liable for a loss arising from the act of the public enemy. It was said by the court, that "the only safe mode of applying the rule is to ascertain whether it can be fairly presumed, from that which is expressly stipulated, that the matter sought to be excluded was present to the minds of the parties when the agreement was entered into. The exclusion can reasonably extend no further than to shut out all implied agreements and stipulations of the same nature, or relating to similar matters." "Indeed, it may be said generally, that the maxim *expressum facit cessare tacitum* is never to be applied in the construction of contracts peremptorily and absolutely, so as to exclude from the contract everything not embraced in the stipulations of the parties. Its legitimate and proper use is, to shut out implied agreements on the same or similar subjects as those concerning which the contract speaks. Even such exclusion should be extended only so far as to subserve the plain intent of the parties."

The expressed exception in this case included other risks

[1] Morrison *v.* Davis & Co., 8 Harris, 171.

[2] Williams *v.* Grant, 1 Conn. 487, 492; Crosby *v.* Fitch, 12 ib. 410.

[3] 9 Allen, 299 (Mass.).

than those comprehended within the class denominated as the acts of God. Perils of the seas embrace, not only inevitable accidents, but many other occurrences to the happening of which human agency directly contributes and which are not included in the expression act of God, for which the carrier is not liable at common law. It was held, therefore, that losses arising from perils of the sea are entirely distinct and diverse and have no necessary connection with or relation to those arising from the acts of the public enemy. They belong to entirely different kinds or classes of risks and no inference can be reasonably drawn from the exemption of the carrier by a special agreement from one class or kind, that it was the intention of the parties that he should assume the other for which the law would not hold him liable, if there had been no exception inserted in the contract.

§ 187. It may, therefore, be generally stated that the expression of any exception to the carrier's liability in the bill of lading will not exclude the implied exceptions, viz., the act of God and the public enemies, but the expression of one of the implied exceptions, viz., either the act of God or the public enemy, both being of the same class or kind, would raise a presumption that both were present to the minds of the parties at the time of the making of the contract and in accordance with the maxim *expressio unius est exclusio alterius*, the omitted exception would be excluded.

§ 188. The exception, loss by "Act of God," though implied in every contract for carriage is nevertheless among the exceptions usually expressed in bills of lading. There are not wanting numerous cases defining the phrase. These definitions are in the main consistent and clear. Act of God is described as, "the violent act of nature,"[1] "inevitable accident without the intervention of man,"[2] "such accidents as are inevitable by the care of man,"[3] "lightning, tempest, and other natural causes beyond human control,"[4] "a natural neces-

[1] Friend *v.* Woods, 6 Gratt. (Va.) 189.

[2] McArthur *v.* Seare, 21 Wend. (N. Y.) 190.

[3] Bell *v.* Read, 4 Binn. (Pa.) 127.

[4] Pennewill *v.* Cullen, 5 Han. (Dec.) 238.

sity which could not have been occasioned by the intervention of man, but which proceeds from physical causes alone,"[1] "all misfortunes and accidents arising from the inevitable necessity which human prudence could not foresee or prevent."[2] Chief Justice KENT, in Elliott *v.* Rossell,[3] defines the phrase as "inevitable necessity not arising from the intervention of man which human prudence could not have avoided."[4]

A certain ambiguity has, however, crept into the use of the phrase by the suggestion of Sir William Jones in his treatise ON Bailments,[5] that the words "inevitable accident" be substituted in its stead, as being more reverent and more exactly expressing the meaning of the common law. This has led in some quarters to an extension of the meaning of the exception and it is not uncommon to find in the books act of God defined by such phrases as the following: "*Casus fortuitus*,"[6] "all unavoidable accidents,"[7] "inevitable accidents."[8] In Brusseau *v.* The Hudson,[9] it is said that the phrase is the equivalent of "the accidental and uncontrollable events" of the Louisiana code. In what sense and to what extent such terms are identical with the phrase, "The Act of God," is elsewhere considered.

§ 189. The definition given by Mr. Justice BRETT in a recent English case includes "such direct, violent, sudden, and irresistible acts of nature as could not, by any amount of ability, have been foreseen, or, if foreseen, could not, by any amount of human care and skill, have been resisted."[10] Mr. Lawson, in his treatise on Contracts of Carriers, having first explained that "any amount of ability" and "any amount of human care and skill" mean only reasonable skill and reasonable

[1] Ferguson *v.* Brent, 12 Md. 9.

[2] Williams *v.* Grant, 1 Conn. 487.

[3] 10 Johns. 1.

[4] See also Merrit *v.* Earle, 29 N. Y. 115; Merchants' D. Co. *v.* Smith, 76 Ill. 542; Chevallier *v.* Straham, 2 Texas, 115; Chapin *v.* Chicago, etc., R'y Co. (Iowa), 44 N. W. Rep. 820.

[5] Jones on Bailments, §§ 104, 105.

[6] Brusseau *v.* Ship Hudson, 11 La. Ann. Rep 427.

[7] Walpole *v.* Bridges, 5 Blackf. (Ind.) 222.

[8] Neal *v.* Landerson, 2 Sm. & M. (Miss.) 572; Robertson *v.* Kennedy, 2 Dana (Ky.), 430.

[9] 11 La. Ann. Rep. 427.

[10] Nugent *v.* Smith, 1 L. R. C. P. Div. 19.

diligence, adopts this as "a correct exposition of the law both in England and America."[1] It may, however, be fairly questioned whether, under the decisions, the act of nature need be sudden and irresistible. It will hereafter be seen that there are cases in the books in which acts of nature, certainly not violent and sometimes not even sudden, have been decided to come under the exception and although the better opinion would seem to be that the more radical of these decisions are erroneous they cannot be wholly disregarded.

A more exact definition is that arrived at by Mr. Justice HARE after an elaborate consideration of the cases, in a note to Coggs *v.* Bernard in Smith's Leading Cases:[2] "I apprehend that the true notion of the exception is those losses that are occasioned exclusively by the violence of nature, by that kind of force of the elements which human ability could not have foreseen or prevented, such as lightning, tornadoes, sudden squalls of wind. If, however, it does not necessarily mean only the *violence of nature*, it certainly is restricted to the *act of nature* and implies the entire exclusion of all human agency, whether of the carriers or of third persons." To this, however, there may be added the statement that the unquestioned tendency of the more recent decisions is to limit the application of the phrase to the extraordinary violence of nature.

In this connection it is to be remarked that it is not necessary in order that a phenomenon fall within the rule that it should happen for a first and only time. In a recent English case, where the damage was by an exceedingly high tide, it was argued that this cause could not be considered the act of God, inasmuch as it had been shown to be not without precedence. This fact was held to be immaterial and it was said that it was enough that the tide was extraordinary and such as could not reasonably have been anticipated.[3]

[1] Lawson on Contracts of Carriers, § 4.

[2] Vol. I., Pt. I., p. 423 (edition of 1885). See cases cited.

[3] Nitro-Phosphate, etc., Co. *v.* Dock Co., 9 L. R. Ch. Div. 503.

In Nashville, etc., R. R. Co. *v.* David C., Heisk. (Tenn.) 261, where the loss was by flood, the fact that the water was high beyond precedent is laid stress on. This fact is clearly of importance in determining whether the loss could have been prevented by reasonable foresight on the part of the carrier and, so be without the exception, but the general law is

§ 190. The following have been held to be losses by the act of God: the destruction of goods by lightning, loss by tornado, by earthquake,[1] by storm,[2] by sudden squall,[3] loss caused by the sudden rising of a river,[4] by flood,[5] by an extraordinary tidal wave,[6] by an extraordinary tide,[7] loss by snow-storm by obstructing the passage of trains,[8] by the freezing of navigable waters,[9] by the freezing of the goods themselves,[10] loss caused by exceedingly high wind,[11] by stress of weather or inclemency of the season,[12] loss by the driving of a boat against a bridge pier in a sudden gust of wind.[13] In Colt *v.* McMechin[14] it appeared that a vessel had been beating up the Hudson against a light and variable wind and being near shore while changing her tack, the wind suddenly ceased, in consequence of which

correctly stated above, that the mere fact of a phenomenon having happened, or not having happened before, will not, of itself, and in the absence of evidence of negligence, either bring the cause under or take it out of the effect of the exception.

[1] Formard *v.* Pittard, 1 T. R. 27.

[2] Morrison *v.* Davis, 20 Pa. St. 171.

[3] Amies *v.* Stevens, 1 Str. 127; Oakley *v.* Portsmouth, etc., Co., 25 L. J. Ex. 99.

[4] Harris *v.* Rand, 4 N. H. 259; Norris *v.* Savannah R. Co., 1 South. Rep 475.

[5] Wallace *v.* Clayton, 42 Ga. 443; Nashville, etc., R. R. Co. *v.* David C., Heisk. (Tenn.) 261; Lamont *v.* Nashville, etc., R. R. Co., 9 Heisk. (Tenn.) 58; Lovering *v.* Buck Md. Coal Co., 54 Pa. St. 291; Read *v.* Spaulding, 5 Bosw. (N. Y.) 395; Memphis, etc. R. R. Co. *v.* Reeves, 10 Wall. 176; Davis *v.* Wabash & R. Co., 89 Mo. 340.

[6] The Thomas Newton, 41 Fed. Rep. 106.

[7] Nitro-Phosphate, etc., Co. *v.* Dock Co., 9 L. R. Ch. Div. 503.

[8] Bridden *v.* Great Northern R. W. Co., 28 L. J. Exch. 51; Ballentine *v.* Northern Missouri R. R. Co., 40 Mo. 491; Ritz *v.* Pennsylvania R. R. Co., 3 Phila. 82; Pruitt *v.* Hannibal, etc., R. R. Co., 62 Mo. 527.

[9] Parsons *v.* Hardy, 14 Wend. (N. Y.) 215; Harris *v.* Rand., 4 N. H. 259; West *v.* The Berlin, 3 Iowa, 532; The Maggie Hammond, 9 Wall. 435; Worth *v.* Edmonds, 52 Bart. (N. Y.) 40; Amies *v.* Stevens, 1 Str. 127; Bowman *v.* Teall, 23 Wend. N. Y. 306.

[10] Nicholas *v.* New York C., etc., R. R. Co., 4 Hun (N. Y.), 327; Vail *v.* Pacific R. R. Co., 63 Mo. 230; Pittsburgh, etc., R. R. Co. *v.* Hazen, 84 Ill. 36.

[11] H. & T. C. R. R. Co. *v.* Haines, 44 Tex. 628; Amies *v.* Stevens, 1 Strange, 127.

[12] West *v.* The Berlin, 3 Ia. 532; Illinois Cent. R. R. Co. *v.* Owens, 53 Ill. 39; Brown *v.* Lamont, 30 Upper Canada, 2 B. 392.

[13] Germania Ins. Co. *v.* The Lady Pike, 17 Am. Law Reg. (O. S.) 614; S. C. 2 Bissell, 141.

[14] 6 Johns. (N. Y.) 160.

she ran aground and sank. The sudden failure of the wind was held by the Court to be the act of God. Where the goods have been jettisoned in a violent storm under justifying circumstances the loss is within the exception.[1]

§ 191. Coming now to cases of more doubtful authority the following have been also declared to be losses by the act of God: the unavoidable breaking down of a sled,[2] damage done by founderous roads,[3] by a high wind blowing a forest fire.[4] There are not wanting cases in which it is intimated that any misfortune or accident that could not be averted by the skill and prudence of the carrier is within the exception,[5] but it is worthy of remark that many of these cases have been specifically overruled and others substantially departed from by the later decisions.

The striking of a ship upon a rock not generally known to mariners,[6] or upon a snag recently lodged in the channel of a river, has been said to be a loss by the act of God.[7] In Pennewill *v.* Cullen[8] the distinction is made that if the rock or shoal upon which the vessel struck was hitherto not known the Master is excused, but if it was known or laid down on any chart it does not fall within the exception. This cannot be given, however, as a correct statement of the law. In Friend *v.* Woods,[9] decided in the same year, the stranding of a vessel on a bar previously unknown is expressly held to be without the exception and this may be considered as more in the line of the recent decisions.[10]

[1] Bird *v.* Astcock, 2 Bulst. 280; Gillet *v.* Ellis, 11 Ill. 579; Johnston *v.* Crane, 1 Kerr (N. B.), 356; Price *v.* Hartshorne, 44 N. Y. 94; Warren *v.* Wilson, 6 Upper Canada, 2 B. (O. S.) 435.

[2] Moses *v.* Norris, 4 N. H. 304.

[3] Boyle *v.* McLoughlin, 4 H. & J. (Md.) 291.

[4] Penna. R. R. Co. *v.* Fries, 87 Pa. St. 234, 235.

[5] Hays *v.* Kennedy, 41 Pa. St. 378; Walpole *v.* Bridges, 5 Blackf. (Ind.) 222; Ereleigh *v.* Sylvester, 2 Brev. (S. C.) 178, overruled by McClenaghan *v.* Brock, 5 Rich. Repts. (S. C.) 17 (1851); see also Harrington *v.* Syles, 2 Nott. & McC. (S. C.) 88 (1819); Patton *v.* Magrath, Dudley (S. C.), 159.

[6] Williams *v.* Grant, 1 Conn. 487; Steele *v.* McTyer, 31 Ala. 667.

[7] Smyrl *v.* Niolan, 2 Bail. (S. C.) 421.

[8] 5 Harr. (Del.) 238.

[9] 6 Gratt. 189.

[10] Redfield on Carriers, § 151, and cases cited.

The recent English case of Nugent *v.* Smith is of interest. Here the action was for the value of a mare the loss of which had resulted from injuries brought on partly by the tossing of the ship in which she was being transported and partly by fright. The Court below held that this was not attributable to the act of God,—Mr. Justice BRETT defining the term in the language already quoted, but the Court of Appeal overruled the Court below and held that such a loss properly falls within the exception.[1]

§ 192. A loss by fire not caused by lightning is not within the exception,[2] nor does it affect the question of liability that the flames have been carried a great distance or diverted from their previous track by an extraordinary wind,[3] nor that the conflagration is one of unusual extent, as the great Chicago fire,[4] nor that the fire is started on board a steamboat by the bursting of the boiler[5] or was originated by the machinery,[6] nor that the loss occurred on the high seas.[7]

Explosion is not the act of God,[8] nor is collision,[9] even if unavoidable, nor are railroad accidents,[10] nor is the breaking of tackle or machinery,[11] nor a defect in the rudder of a vessel,[12] nor the breaking of a chain thought to be sound,[13] nor the bursting of a cask containing chloride of lime,[14] nor is a heavy fall of rain,[15]

[1] 1 L. R. C. P. Div. 19 and 423.

[2] Forward *v.* Pittard, 1 T. R. 27; Patton *v.* Magrath, Dudley (S. C.), 159; Cox *v.* Peterson, 30 Ala. 608.

[3] Miller *v.* Steam Nav. Co., 10 N. Y. 431; Chevallier *v.* Straham, 2 Texas, 115; Parsons *v.* Monteath, 13 Barb. (N. Y.) 353. But see R. R. Co. *v.* Fries, *supra*.

[4] Merchants Dispatch Co. *v.* Smith, 76 Ill. 542.

[5] McCall *v.* Brock, 5 Stroth (S. C.), 119.

[6] Hale *v.* New Jersey S. N. Co., 15 Conn. 539.

[7] Same *v.* same, *supra*.

[8] Houston, etc., Nav. Co. *v.* Dwyer, 29 Texas, 376; Bulkley *v.* Naumkeag Steam Cotton Co., 24 Horr. 386.

[9] Raisted *v.* Boston, etc., S. N. Co., 27 Me. 132; The Propeller Mohawk, 8 Wall. 153; Mershon *v.* Hobensack, 2 Zabr. (N. J.) 380; *contra*, Lawrence *v.* McGregor, 1 Wr. Ch. (O.) 193.

[10] Illinois Cent. R. R. Co. *v.* Owens, 53 Ill. 391.

[11] De Moet *v.* Laraway, 14 Wend. (N. Y.) 225.

[12] Backhouse *v.* Sneed, Murph. (N. C.) 173.

[13] Central Line of Boats *v.* Lowe, 50 Ga. 509.

[14] Brousseau *v.* Ship Hudson, 11 La. Ann. Rep. 427.

[15] Klauser *v.* Express Co., 21 Wisc. 21. But see McHenry *v.* P. W. & B. R. R. Co., 4 Harr. (Del.) 448.

nor the rising of waves caused by the stopping of a vessel,[1] nor the running against a vessel capsized in a storm,[2] nor the running against a sunken anchor in the river over which a buoy formerly was,[3] nor the shifting of a buoy,[4] nor the rolling of the vessel,[5] nor mistaking a light,[6] nor the formation of a bar in the river,[7] nor running against a known rock in a fog,[8] nor running upon a snag,[9] nor running aground,[10] nor running upon a piece of timber not visible at ordinary tides,[11] nor the sinking of a vessel at her wharf while undergoing repairs,[12] nor the escape of water through the pipe of a steam boiler cracked by frost, the boiler having been filled before the time of heating it.[13] An extraordinarily low tide which interferes with the progress of a carrier by water, though perhaps the act of God, is not such in the sense of being an excuse for the carrier. A carrier may, without liability, delay until the adverse winds and dangers from the low tide have passed away, but if he sails he takes the risk of dangers from such causes.[14]

§ 193. The accident, to come within the exception, must be directly due and traceable to the act of God.[15] Where the proximate cause of the loss was some cause other than the act

[1] Oakley *v.* Portsmouth, etc., Packet Co., 11 Exch. 617.

[2] Merritt *v.* Earle, 31 Barb. (N. Y.) 38.

[3] Proprietors Trent Nav. Co. *v.* Wood, 3 Esp. 127.

[4] Reaves *v.* Waterman, 2 Spear's Rep. (S. C.) 197.

[5] The Reeside, 2 Sumner, 567.

[6] McArthur *v.* Sears, 21 Wend. (N. Y.) 190; but mistaking a light without accompanying negligence is within the exception perils of the sea. The Juniata; Paton *v.* Bliss, 1 Bissell, 15.

[7] Friend *v.* Woods, 6 Gratt. (Va.) 189.

[8] Fergusson *v.* Brent, 12 Md. 9.

[9] Eveleigh *v.* Sylvester, 2 Brev. (S. C.) 178. Reversed in McClenaghan *v.* Brock, 5 Rich. (S. C.) 17.

[10] S. S. Co. *v.* Bason, Harp. L. Reps. (S. C.) 262.

[11] New Brunswick S. N. Co. *v.* Tiers, 24 N. J. (Law), 697; Bohannon *v.* Hammond, 42 Cal. 227.

[12] Packard *v.* Taylor, 35 Ark. 402.

[13] Buller *v.* Fisher, Peake's Ad. Cas. K. B. 183. See Siordet *v.* Hall, 4 Bing. 607.

[14] Boyle *v.* McLaughlin, 4 H. & J. (Md.) 291; Collier *v.* Swinney, 16 Mo. 484; Silver *v.* Hall, 2 Mo. App. 557.

[15] Merril *v.* Earle, 31 Barb. (N. Y.) 38; S. C. affirmed, 29 N. Y. 115: Sprowl *v.* Kellar, 4 Stew. & P. (Ala.) 382; Ewart *v.* Street, 2 Bailey (S. C.), 157; King *v.* Shepherd, 3 Story, 349. In Wolf *v.* American Express Co., 43 Mo. 421, the law is more severely stated. It is there said that the act of God must be not the proximate but also the sole cause of loss.

of God, the carrier is not relieved by the exception and conversely where the proximate cause was the act of God, the Court will not inquire into the remote cause.[1] The maxim is, *causa proxima non remota spectatur.*[2]

Where several causes have combined to produce loss, one of which, though not the immediate cause, was the act of God, the carrier is not exonerated under this exception.[3] Thus, where a steamboat in the night ran against the mast of the sloop sunk in a squall two days before, the carrier was held liable,—the loss being the result of mixed causes and not the immediate result of natural forces alone.[4] So where a vessel ran aground in a storm, the master having mistaken the light, the storm was held to be *causa remota.*[5]

Where, however, the real cause of loss was the violent act of nature, the mere fact that negligence, delay, or deviation has been shown, will not render the carrier liable. Thus, the mere fact of the employment of a pilot without skill will not rebut the conclusion of the exemption of the carrier from liability, unless it be shown that the loss resulted from this fact.[6] The failure to forward goods promptly will not render the carrier liable for a loss proximately caused by the act of God.[7] Even negligence is immaterial where it has contributed to loss only as a remote cause.[8]

§ 194. Ordinarily, however, the negligence of the carrier will take the loss out of the exception or, to state the matter more accurately, where the loss is attributable to the act of God and the neglect of the carrier concurring, the carrier is liable.[9] Thus, the act of God cannot be urged successfully as a defence when an

[1] Memphis, etc., R. R. Co. *v.* Reeves, 10 Wall. 196.

[2] Same, *supra.*

[3] N. B. S. & C. Trans. Co. *v.* Tiers, 4 Zabr. (N. J.) 697; Fergusson *v.* Brent, 12 Md. 9.

[4] Merrit *v.* Earle, 31 Barb. (N.Y.) 38.

[5] McArthur *v.* Sears, 21 Wend. (N. Y.) 190.

[6] Hart *v.* Allen, 2 Watts (Pa.), 114.

[7] Lamont *v.* N. &. C. R. R. Co., 9 Heisk. (Tenn.) 58.

[8] Memphis, etc., R. R. Co. *v.* Reeves, 10 Wall. 176; Hoadley *v.* Trans. Co., 115 Mass. 304.

[9] Williams *v.* Grant, 1 Conn. 487; Brooke *v.* Pickwick, 4 Bing. 218; Read *v.* Spalding, 5 Bosw. (N. Y.) 395; Brodenham *v.* Bennett, 4 Price, 31; Birkett *v.* Willan, 2 B. & A. 356; Smith *v.* Horn, 2 Moore, 18; S. C. 8 Taunt. 144.

unseaworthy vessel has been lost at sea[1] or where the loss is due to bad loading as well as to the wind,[2] or where a ship is set on fire by a cargo of lime being wetted during a storm, the ship having necessarily deviated from her course,[3] or where the carrier negligently allowed the goods to remain on the wharf and they were destroyed by storm,[4] or where a buggy was blown from a car by violent wind, it not being clear that it had been securely fastened,[5] or where the carrier, a ferryman, started to cross the river when a dangerous wind was blowing,[6] or where a wagon attempted to cross a swollen stream with an insufficient team.[7]

Bad packing of the goods shipped will prevent the act of God being set up successfully as a defence. If the injury, however, may be attributed as well to the one cause as to the other, the carrier will not be liable.[8]

The carrier is bound to exercise proper foresight and prudence in anticipating the act of God, to exert the proper means for meeting and overcoming it and to use due diligence in accomplishing the transportation as soon as it ceases to operate and in protecting the goods against further loss if left in a damaged or exposed condition.[9]

§ 195. The question naturally occurs: What amount of prudence, foresight and skill must the carrier use in order to have the advantage of the exception? In Briddon *v.* Great Northern

[1] Bell *v.* Read, 4 Binn. (Pa.) 127.

[2] Spencer *v.* Daggett, 3 Vt. 92.

[3] Davis *v.* Garrett, 6 Bing. 716.

[4] Morgan *v.* Dibble, 29 Texas, 108; McHenry *v.* P. W. & B. R. R. Co., 4 Harr. (Del.) 448.

[5] H. & T. R. W. Co. *v.* Hano, 44 Texas, 628.

[6] Cook *v.* Gourdin, 2 Nott. & M. (S. C.) 19.

[7] Campbell *v.* Morse, Harp. L. R. 468.

[8] Muddle *v.* Stride, 9 Car. & P. 380.

[9] Bowman *v.* Teale, 23 Wend. (N. Y.) 306; Baltimore, etc., R. R. Co. *v.* Morehead, 5 W. Va. 293; Memphis, etc., R. R. Co. *v.* Reeves, 10 Wall. 176; Peck *v.* Weeks, 34 Conn. 152; Lamont *v.* R. R. Co., 9 Heisk. (Tenn.) 58; Tuckerman *v.* Trans. Co., 3 Vroom (N. J.), 320; Wallace *v.* Clayton, 42 Ga. 443; The Maggie Hammond, 9 Wall. 435; Dibble *v.* Morgan, 1 Woods, 406; Read *v.* Spalding, 5 Bosw. (N. Y.) 395; Morgan *v.* Dibble, 29 Texas, 107; Harmony *v.* Bingham, 12 N. Y. 99; Shieffelin *v.* Harvey, 6 Johns. (N. Y.) 170; Feinberg *v.* D. L. & W. R. R. Co. (N. J.), 20 Atl. Rep. 33.

Railway Co.,[1] it is said that extraordinary efforts may be required of him. In Nugent *v.* Smith,[2] already cited, it is said that the exception included such acts of nature as the defendant could not "by any amount of ability foresee" or if he could foresee "could not by any amount of care and skill resist." Chief Justice Cockburn in reversing the judgment of the lower court in this case, states the law more reasonably, thus: "All that can be required of the carrier is, that he shall do all that is reasonably and practically possible to insure the safety of the goods. If he uses all the known means to which prudent and experienced carriers ordinarily have recourse, he does all that can reasonably be required of him and if under such circumstances, he is overpowered in storm or other natural agencies, he is within the rule which gives immunity from the effects of such *vis major* as the act of God."

§ 196. Mere delay unaccompanied by negligence on the carrier's part will not defeat his defence under this exception where goods were frozen during a delay caused by the violence of a mob.[3] With respect to negligent delay, however, the decisions are conflicting. The rule in some States would seem to be that mere delay of itself is too remote a cause to be regarded in connection with the loss. This is the effect of the case of Railroad Co. *v.* Reeves,[4] in the Supreme Court of the United States and of the ruling in Massachusetts[5] and in Pennsylvania.[6] In New York,[7] in Missouri[8] and in Nebraska[9] the reverse has been held.

In Michigan Central Railroad Co. *v.* Curtis,[10] the Supreme Court of Illinois have gone even farther in holding that where fruit trees were delayed so long by one carrier that they were

[1] 28 L. J. (Exch.) Rep. 51.

[2] Section 191.

[3] Pittsburgh, etc., R. R. Co. *v.* Hazen, 84 Ill. 36.

[4] 10 Wall. 176.

[5] Denny *v.* New York Central R. R. Co., 13 Gray (Mass.), 481; Hoadley *v.* Northern Trans. Co., 115 Mass. 304.

[6] Morrison *v.* Davis, 20 Pa. St. 171.

[7] Read *v.* Spalding, 30 N. Y. 630; Michaels *v.* New York Central R. R. Co., ib. 564. (See opinion of Davies, J., 578.)

[8] Vail *v.* Pacific R. R. Co., 63 Mo. 230.

[9] Dictum in McClary *v.* Sioux City, etc., R. R. Co., 3 Neb. 44.

[10] 80 Ill. 324.

frozen in the hands of the connecting carrier and it was impossible to save them, the first carrier could be held for the loss.

In Browne on Carriers, the law is thus stated: "If he (the carrier) delays an unreasonably long time on the journey and it is proved that but for such an unreasonable waste of time he would have been able to deposit his goods in safety, it will not be a good defence to an action for the amount of injury done to the goods of an owner who intrusted them to him to be carried to say, that the injury was caused by a flood which was the act of God."[1]

§ 197. Deviation has been defined as any unnecessary or unexcused departure from the usual or general mode of carrying on the voyage.[2] It has been repeatedly held that where the loss ensues from such negligent act of the carrier, coupled with the act of God, the carrier is liable.[3] The deviation is to be regarded as the proximate cause of the loss.[4]

It has been said that necessity can sanction deviation and this, though inconsistent with the definition here adopted, is in principle the accepted law, but applies only so far as the necessity exists and will not authorize a deviation incommensurate "with the *vis major* producing it."[5] The necessity must be real and not supposititious and the burden of proving the necessity rests with the carrier.[6]

The rule applies to carriers by land as well as to carriers by water.[7] It is deviation for the carrier having contracted to carry

[1] Browne on Carriers, § 95. See also, Bonanno *v.* Boskenna Boy, 36 Fed. Rep. 697; Blodgett *v.* Abbott, 72 Wis. 516; S. C. 40 N. W. Rep. 491.

[2] 15 Am. L. Rep. 108; Bond *v.* The Cora, 2 Pet. Adm. 373; Coffin *v.* Newburyport Ins. Co., 9 Mass. 436.

[3] Lawrence *v.* McGregor, 1 Wr. Ch. (O.) 193; Crosby *v.* Fitch, 12 Conn. 410; Davis *v.* Garrett, 6 Berry, 716; Powers *v.* Davenport, 7 Blackf. (Ind.) 497; Phillips *v.* Bingham, 26 Ga. 617; Maghee *v.* Camden, etc., R. R. Co., 45 N. Y. 514; Angell on Carriers, §§ 203, 204.

[4] Story on Bailments, § 413.

[5] Maryland Ins. Co. *v.* Levy, 7 Cranch, 26.

[6] Hand *v.* Baynes, 4 Whart. (Pa.) 204; Le Sage *v.* Great Western R. R. Co., 1 Daly, 306; Ackley *v.* Kellogg, 8 Cow. (N. Y.) 223.

[7] Powers *v.* Davenport, *supra;* Lawrence *v.* McGregor, *supra;* Phillips *v.* Bingham, *supra.*

goods by rail to take them by water,[1] or having contracted to convey them by sailing vessel,[2] to ship them by a steamship, or having contracted to carry them by canal, to take them out to sea.[3] The necessary crossing of a ferry is not deviation, but in Maghee *v.* Camden, etc., Railroad Co.,[4] where the bill of lading contained the words "all rail" and the goods were sent from Indianapolis to New York, by rail to Amboy and by boat from Amboy to New York, a distance of twenty miles, instead of by the more direct route by way of Jersey City, this was held to be deviation.

As a general rule, it may be said that where a particular line of ships, or even a particular ship, is nominated in the bill of lading, it is deviation for the carrier to ship by any other.[5] "The skill and experience of the master of the boat, the character is approved, and the stanchness and speed of the boat may all be taken into consideration by the owner or shipper of goods in selecting a boat for the carriage of his goods. Having done so, he has a right to require that the contract be fulfilled in the manner agreed, unless the master of the boat reserves the privilege of reshipping."[6]

§ 198. An interesting case, though not one strictly within the letter of the exceptions under consideration, is that of Bazin *v.* Liverpool, etc., S. S. Co.[7] The bill of lading contained the words, "received in and upon the steamship called Shamrock, now in the port of Havre and bound for Liverpool, 18 cases of merchandise to be transshipped at Liverpool on board the Liverpool and Philadelphia steamship City of Manchester or other steamship appointed to sail for Philadelphia on Wednesday, the 5th day of Sept., and failing shipment by her, then by the first steamship sailing after that date for Philadelphia." The exceptions included loss by "accidents on the sea." The

[1] Bostwick *v.* Baltimore, etc., R. R. Co., 45 N. Y. 717; Maghee *v.* Camden, etc., R. R. Co., *supra;* Ingalls *v.* Brooks, Ed. Sel. Cas. 104.

[2] Merrick *v.* Webster, 3 Mich. 268.

[3] Hand *v.* Baynes, 4 Whart. (Pa.) 204.

[4] 45 N. Y. 514.

[5] Dunseth *v.* Wade, 2 Scammon (Ill.), 285; Goddard *v.* Mallory, 52 Barb. (N. Y.) 87; Johnson *v.* New York Central R. R. Co., 33 N. Y. 610, reversing 31 Barb. (N. Y.) 196.

[6] 2 Scammon (Ill.), 285.

[7] 3 Wall., Jr., 229.

goods arrived at Liverpool some time prior to the 6th of Sept., and another of defendant's steamships, the City of Philadelphia, sailing in the meanwhile, part of the goods were shipped in her and part retained and sent by the City of Manchester. The City of Philadelphia was wrecked and the goods sent by her lost. The defendants urged that the custom of the trade was to forward goods as soon as possible and that there was no reason for the plaintiffs specifying the City of Manchester as the steamship by which the goods were to be forwarded. The court held that the plaintiff was not bound to disclose a reason; that he was entitled to have the contract of the bill of lading fulfilled according to its stipulation and that the carrier, by shipping the goods by another vessel, had virtually made himself an insurer of their safety.

The carrier is bound to deliver the goods to the connecting carrier indicated in the bill of lading. If he deliver them to any other, this is such deviation on his part as will make him liable for any loss in the subsequent transit. No stipulations against liability beyond his own line will have the effect of relieving him.[1] If he is unable to forward them by the carrier, or even by the boat indicated, he should, if possible, wait for further instructions from the shipper.[2] In Johnson *v.* New York Central R. R. Co., the goods were billed to be forwarded via "People's Line" from Albany. On arriving at Albany, the People's Line refused to receive them and they were forwarded by another company. The case was heard in the Supreme Court and decided for the defendant, but on appeal to the Court of Appeals, this ruling was reversed and the railroad company held liable.[3]

§ 199. Where the shipper has consented to the deviation, the carrier is relieved from liability. In Hendricks *v.* The Morning Star,[4] it was shown that although the bill of lading

[1] Fatman *v.* Cincinnati, etc., R. R. Co., 2 Disney, 248.

[2] Fisk *v.* Newton, 1 Denio, 45; Goodrich *v.* Thompson, 44 N. Y. 324.

[3] 31 Barb. 196.

[4] 18 La. Ann. Rep. 353. Here the loss was occasioned by the public enemy, the goods having been destroyed by a hostile cruiser. In this connection, see Harris *v.* Rand, 4 N. H. 259, the authority of which, however, is questioned by Mr. Lawson in his work on the Contracts of Carriers, § 143.

nominated a certain vessel, the shipper had consented to the substitution of another of the same line and that the goods were shipped in her and were lost. The court held the carrier discharged. It would seem the consent of the owner may in certain cases be assumed. Indeed, where the deviation is necessary to preserve the goods, the carrier not only may, but must deviate.[1] Thus, in Harmony *v.* Bingham,[2] where the goods were billed to be sent by a canal, which was found to be impassable, by reason of freshet, it was held that the act of God could not be set up as an excuse, inasmuch as the goods could have been forwarded by another route.

§ 200. Where a loss or damage has been caused by act of God, it is the duty of the carrier to make all proper effort to prevent further injury. He is liable for the safe custody of the goods in their damaged condition. The amount of diligence required in such an emergency is to be determined by the same rules as those applicable under other circumstances. He is bound to use actively and energetically such means to save the goods as prudent and skilful men engaged in that business might be fairly expected to use under like circumstances, but not necessarily "all the diligence that human sagacity can suggest."[3]

What are such means depends upon the circumstances of each case. Thus, where a package containing furs had been wetted by storm, the court said that it was the carrier's duty to have had it opened and the goods dried,[4] but where peaches were being carried by rail and a bridge of the railroad having been washed away by freshet, it was impossible to forward them and, as they showed signs of decay, they were sold, the carrier was held exonerated from responsibility for their loss.[5] The rule under consideration is but an application of the gene-

[1] The Maggie Hammond, 9 Wall. 430; Williams *v.* Vanderbilt, 28 N. Y. 217; Sager *v.* Portsmouth, etc., R. R. Co., 31 Me. 228.

[2] 12 N. Y. 99.

[3] Nashville, etc., R. R. Co. *v.* David, 6 Heisk. (Tenn.) 261; Craig *v.* Childress, Peck, 270; Day *v.* Ridley, 16 Vt. 48; Wallace *v.* Clayton, 42 Ga. 443; Read *v.* Spalding, 5 Bosw. (N. Y.) 395; Galt *v.* Archer, 7 Gratt. (Va.) 307.

[4] Chouteaux *v.* Leech, 18 Pa. St. 224.

[5] American Express Co. *v.* Smith, 33 Ohio St. 511.

ral principle of the carrier's responsibility for the results of his own negligence.

§ 201. The general phrase "inevitable accident" (or "unavoidable accident") is sometimes inserted in bills of lading. In some of the cases this is construed as being the exact equivalent of act of God,[1] while another line of cases seems to assert that it has a somewhat different meaning.[2] Said Chief Justice LOWRIE, of Pennsylvania, in Hays *v.* Kennedy:[3] "We are quite satisfied that the weight of authority and of reason shows that the ordinary exceptions in a bill of lading of unavoidable accidents have a much larger sphere than that which is attributable to the term act of God."

§ 202. If the former of these classes of cases is to be followed the exception under consideration in no way shifts the common law liability,[4] but if the latter, its meaning is more difficult to determine.

In a Georgia case[5] it is said that though unavoidable accident is distinguishable from act of God there must be in it an irresistible *vis major*, so that the breaking of an iron rod because of a secret flaw in it is not unavoidable accident, but is negligence on the part of the carrier. So also, fire[6] and theft[7] have been held not to come within the exception, but the damage by breaking of a dam in a canal is excusable on this ground.[8]

In Spence *v.* Chadwick,[9] an English ship had on her voyage

[1] Neal *v.* Sanderson, 2 Sm. & M. (Miss.) 572; Moses *v.* Norris, 4 N. H. 304. But see Hall *v.* Cheney, 36 N. H. 26; Fish *v.* Chapman, 2 Ga. 349; Walpole *v.* Bridges, 5 Blackf. (Ind.) 222; Lawrence *v.* McGregor, 1 Wr. Ch. (O.) 193; Brousseau *v.* The Hudson, 11 La. Ann. Rep. 427; Boyce *v.* Anderson, 2 Pet. 150; Merchants' D. T. Co. *v.* Smith, 76 Ill. 542; Fowler *v.* Davenport, 21 Texas, 626; Seligman *v.* Armiyo, 1 New Mexico, 459.

[2] McArthur *v.* Lears, 21 Wend. (N. Y.) 190; Central Line of Boats *v.* Lowe, 50 Ga. 509; Dibble *v.* Morgan, 1 Woods, 406; Hall *v.* Cheney, 36 N. H. 26.

[3] 41 Pa. St. 378.

[4] Walpole *v.* Bridges, 5 Blackf. (Ind.) 222.

[5] Central Line of Boats *v.* Lowe, 50 Ga. 509.

[6] Merchants' D. Co. *v.* Kahn, 76 Ill. 520; Miller *v.* Steam Nav. Co., 13 Barb. (N. Y.) 361.

[7] Kemp *v.* Coughtry, 11 Johns. (N. Y.) 107.

[8] Morrison *v.* McFadden, Penna. L. J; 5 Clark, 23.

[9] 10 A. & E. (N. S.) 517; S. C. 16 L. J. Q. B. 313.

touched a Spanish port and there certain goods on board had been confiscated as contraband, having been condemned by a competent court under the laws of Spain. The bill of lading included the exceptions "act of God, all and every other dangers and accidents of the seas, rivers, and navigation of what nature and kind soever." It was held that the loss was by none of these, but by inevitable necessity, against which the carrier ought to have provided by contract.

CHAPTER XIV.

EXCEPTIONS CONTINUED—ACCIDENTS OF MACHINERY—BARRATRY—COLLISION.

"Accidents of machinery," etc., §§ 203, 204.
"Barratry;" definition, § 205.
Acts held to be barratrous, §§ 206, 207, 208.
Barratrous act must be prejudicial to owner, § 209.
Master who is also owner cannot commit barratry, § 210.
Act of part-owner may be barratrous, § 211.
"Collision;" conditions under which it may arise, §§ 212, 213.
Duty to protect goods after collision, § 214.
Collision not presumptively due to negligence, § 215.

§ 203. CAUSES of loss, such as "accidents of machinery—of boiler—of engine—of steam," are without the common law exception, "the act of God."[1] Whether they are included within the phrase "perils of the sea" is not altogether clear.[2] The expression of such exceptions in the bill of lading is perhaps advisable, but certainly it adds no immunity from liability where the carrier has been guilty of negligence. In Czech *v.* General Steam Navigation Company[3] it appeared that injury had been done to goods by oil from a donkey engine used in raising and lowering the cargo, near which they had been negligently stowed. The exceptions in the bill of lading included "damage by machinery." It was said that the carrier must nevertheless answer for the results of his own negligence. So where it appeared that loss had been occasioned by steam escaping through a crack in the boiler of a steamship

[1] DeMoet *v.* Laraway, 14 Wend. (N. Y.) 225; Central Line of Boats *v.* Lowe, 50 Ga. 509; Navigation Co. *v.* Dwyer, 29 Tex. 376; Bulkley *v.* Naumkeag Steam Cotton Co., 24 How. 386; Hale *v.* Steam Navigation Co., 15 Conn. 539.

[2] Laurie *v.* Douglas, 15 M. & W. 746.

[3] 37 L. J. C. P. 3; S. C., L. R. 3; C. P. 14.

and that the boiler had cracked by reason of having been allowed to remain over night filled with water, when not in use and in very cold weather. This the court said was negligence and the carrier was held liable.[1] Ordinarily, however, the leaking of a boiler by which goods are injured, where negligence by the carrier cannot be shown, is within the exception.[2] The phrase "damage from machinery" will not cover a loss caused by the breaking of tackle used to discharge cargo. The word machinery, it has been said, includes only the machinery by which the vessel is propelled.[3]

§ 204. The exception, however, does contemplate salvage services rendered necessary by the breaking of such propelling machinery upon the high seas.

In the Miranda[4] the bill of lading included among the excepted perils the phrase "accidents of the machinery." The vessel on which the goods were being transported injured the crank shaft of her engine and was towed into harbor by another vessel belonging to the same owners. The action was for salvage by the owners, master and crew of the Roxana, the latter vessel, against the owners of the cargo of the Miranda, the former vessel. It was held that the plaintiffs were entitled to recover, notwithstanding the fact that the owners of the Roxana were also owners of the Miranda, and that the defendants could not throw off their liability upon the carrier, inas-

[1] 4 Bing. 607; S. C. 6 L. J. C. P. 137; Buller *v.* Fisher, Park's Ad. Cas. (K. B.) 183.

[2] Moosum *v.* Brit. India Steam Nav. Co., 8 Cal. W. R. C. R. 35. Here the bill of lading contained the phrase "accident by boilers, steam," etc.

In Cox *v.* Star Nav. Co. (Mit. Mar. Reg.), where damage had been done to a cargo of rice on a voyage from Calcutta to Liverpool, water having found its way into the engine-room by means of a bilge cock having been left unturned and owing to a door being left open, having gone from the engine-room to the part of the vessel where the rice was stowed and damaged it; the question was whether this fell within the excepted perils in the bill of lading, viz., "boilers, steam, machinery, and their appurtenances." It was held that being one of the excepted risks the defendants were not liable. Cited in Leggett on Bills of Lading, p. 183.

[3] As where the machinery was put out of order by storm, and steam escaped into the hold. Kelham *v.* The Kensington, 24 La. Ann. Rep. 100. The Galley of Lorne, Mit. Mar. Reg. Feb. 11, 1876. Cited in Leggett on Bills of Lading, p. 179.

[4] 41 L. J. Adm. 82.

much as salvage under such circumstances fell within the excepted perils. The exception also covers a loss caused by frost at the time of delivery, when there was a delay due to the breaking of the machinery.[1] If the machinery appears to have been of good material and frequently inspected and that there was no negligence on the part of the owners, the exception will apply in favor of the ship and its owners.[2]

§ 205. The term "barratry" has been but seldom defined in connection with bills of lading, but there are in the books numerous cases construing it as occurring in policies of marine insurance. It is to these, therefore, that reference is to be made in determining the meaning of the exception under consideration. Considerable discussion has been had as to the derivation of the word barratry and as to its consequent signification.[3] Following the idea of fraud or deceit which undoubtedly exists in the word, the early cases define the term as including "every species of fraud or knavery in the master or mariners of the ship by which the owners or freighters are injured."[4] Said Lord KENYON: "There must be fraud to constitute barratry."[5] More recent cases seem scarcely to bear out this assertion. In Patapsco Insurance Company *v.* Coulter, Mr. Justice JOHNSON went carefully over the grounds of the various decisions and in conclusion held that barratry is not confined to fraud. He preferred the definition of Emerigon, which he translated "acting without due fidelity to the owners."[6] Prof. Parsons, in his treatise on Marine Insurance, uses nearly the same language: "Any wrongful act of the master, officers, or crew done against the owner."[7] A more full definition however would be, the wrongful act wrongfully intended of the master or mariners of a vessel, prejudicial

[1] Seaman *v.* Adler, 37 Fed. Rep. 268.

[2] Chadwick *v.* Denniston, 41 ib. 58.

[3] The English word is probably an adaptation of the French barat, barraterie (robbery, deceit, fraud), which is itself from the Italian.

[4] This is the definition of Buller, J., in Lockyer *v.* Affley, 1 T. R. 252; see also Knight *v.* Cambridge, 1 Str. 581 (9 Geo. II.); Valleys *v.* Wheeler, 1 Cowper, 143; Cousillat *v.* Ball, 4 Dall. 294; Wilcocks *v.* Union Ins. Co., 2 Binn. (Pa.) 574; Wiggin *v.* Amory, 14 Mass. 1.

[5] Phyn *v.* Royal Exch. Ins. Co., 7 T. R. 505.

[6] 3 Pet. 222.

[7] Vol. 1, c. xvii., § 6.

to and without the knowledge of the owners. The act must be wrongful. It must amount to a fraudulent violation or a wilful abandonment of duty. Mere negligence, unless so gross that wilfulness is to be presumed, is not barratrous. Thus, where a bill of lading excepted "barratry," and the vessel in which the goods were being carried met another vessel under such circumstances that it was the duty of the master and crew of the former to have ported her helm and so have obviated the collision and loss of goods which followed, it was held that the conduct of the master and crew did not bring the loss within the exception.[1]

§ 206. The following acts have been held to be barratrous: attempting to run a blockade,[2] disregarding an embargo,[3] carrying contraband of war,[4] taking on board the cargo out of a captured ship of the enemy before it has been condemned by a prize court,[5] resistance of a neutral vessel to the search of a belligerent,[6] an attempt to recapture a vessel illegally taken,[7] collusion between the master and the captain of a privateer as to the capture of the ship,[8] smuggling,[9] stealing of cargo by mariners (other than petty thieving),[10] delay for fraudulent pur-

[1] Grill *v.* Iron Screw Colliery Co. (Limited), L. R. 3 C. P. 476.

[2] Everth *v.* Hannam, 6 Taunt. 375; Goldschmidt *v.* Whitmore, 3 ib. 508. But see Vos *v.* United Ins. Co., 2 Johns. Cas. 180. In Calhoun *v.* Fitzimmons, 1 Binn. (Pa.) 293, 321, and fol., it was shown that a ship had been seized while nearing the blockaded city of Cadiz. The admiral of the blockading squadron subsequently asked the master, if released, to what port he would go. To which the master made answer, indicating that he would attempt to enter Cadiz. This was held to constitute barratry.

[3] Robertson *v.* Ewer, 1 T. R. 127.

[4] Suckley *v.* Delafield, 2 Caines, 222.

[5] Ward *v.* Wood, 13 Mass. 539.

[6] Brown *v.* Union Ins. Co., 5 Day (Ct.), 1.

[7] Dederer *v.* Delaware Ins. Co., 2 Wash. C. C. 61; Wilcocks *v.* Union Ins. Co., 2 Binn. (Pa.) 574.

[8] Arcangelo *v.* Thompson, 2 Camp. 620.

[9] Stone *v.* National Ins. Co., 19 Pick. (36 Mass.) 34; American Ins. Co. *v.* Bryan, 26 Wend. (N. Y.) 563; Havelock *v.* Hancill, 3 T. R. 277; Lockyer *v.* Offley, 1 ib. 252. In the last case, the ship having been moored at the wharf for twenty-four hours before seizure, under the terms of the policy, the insurer was discharged. Marialegue *v.* Louisiana Ins. Co., 8 La. Rep. 65.

[10] American Ins. Co. *v.* Dunham, 12 Wend. (N. Y.) 463; Pipon *v.* Cope, 1 Camp. 434.

poses,[1] wilfully running the ship ashore,[2] taking the vessel out of her course and selling part of her cargo,[3] going to an enemy's coast to trade,[4] carrying Polynesian laborers without a license with full knowledge of the Act of 35 and 36 Vict., C. 19, forbidding it,[5] using the vessel for privateering purposes contrary to the owners' instructions, notwithstanding the fact that a letter-of-marque had been taken out for the ship by the owners.[6]

§ 207. Not merely the act but the intention of the master or crew which leads to its commission must be wrongful. In the language of Lord ELLENBOROUGH, "in order to constitute barratry the captain must be proved to have acted against his better judgment."[7] Very many acts therefore, not ordinarily barratrous, become so if done with barratrous intent. Such are the transshipping of the cargo,[8] the neglect to make practicable repairs,[9] the desertion of the vessel by the crew through fear of capture,[10] the breaking up of the ceiling and end bows of the ship so that she was thereby much weakened,[11] the taking on board of French refugees in violation of neutrality laws.[12] Such also is deviation. Mere deviation is not of itself barratrous.[13] To come within the term barratry, it must be without the owners' assent and contrary to the owners' interest. Deviation, even for the sake of pursuing an enemy's ship or to make a capture, will not be barratrous, unless entered upon for the aggrandizement of the master or crew or contrary to the owners' orders.[14] If, however, a barratrous deviation be once entered

[1] Roscow *v.* Corson, 8 Taunt. 684; Ross *v.* Hunter, 4 T. R. 33.

[2] Soares *v.* Thomson, 7 Taunt. 627.

[3] Dixon *v.* Reid, 5 B. & Ald. 597; S. C. 1 D. & R. 207; Lawton *v.* Sun Mutual Ins. Co., 2 Cush. (56 Mass.) 500. But see Hibbert *v.* Martin, 1 Camp. 539.

[4] Earle *v.* Rowcroft, 8 East, 126.

[5] Australasian Ins. Co. *v.* Jackson, 3 Asp. Mar. Law Ca. (N. S.) 26.

[6] Moss *v.* Byrom, 6 T. R. 379.

[7] Todd *v.* Ritchie, 1 Stark. 190.

[8] Stuart *v.* Tennessee M. & F. Ins. Co., 1 Humph. 242.

[9] Ib.

[10] Messonier *v.* Union Ins. Co., 1 N. & McC. (S. C.) 155.

[11] Todd *v.* Ritchie, 1 Stark. 190.

[12] Crousillat *v.* Ball, 4 Dall. 294.

[13] Stamma *v.* Brown, 2 Str. 1173 (16 Geo. II.); Vallego *v.* Wheeler, 1 Cowper, 143; Phyn *v.* Royal Exch. Ins. Co., 7 T. R. 505; Thurston *v.* Columbian Ins. Co., 3 Caines (N. Y.), 89; Wiggin *v.* Amory, 14 Mass. 1.

[14] Wiggin *v.* Amory, ib. In Hood's Exr's *v.* Nesbit, 2 Dallas, 137, the law is stated substantially thus: If the master deviate and make a capture for his own private advantage alone, this is barra-

upon, barratry may be set up as the cause of loss, whether the loss occurred actually during the fraudulent voyage or afterwards, if barratry be, indeed, the proximate cause of loss.[1]

§ 208. It is no defence to the charge of barratry, to set up the fact of the master's drunkenness, but it is otherwise with respect to insanity, even if brought on by excessive drinking. The master of a whaling vessel, instead of cruising for whales, put into the port of Taheti and there performed various barratrous acts. It was endeavored to be shown by the defence that these acts were done by the captain while under the influence of liquor, but the court held that this was no defence, unless it could be made clear that at the very time of the commission of the barratrous acts, the master was in a fit of *delirium tremens* or laboring under some other form of insanity.[2]

Barratry is the act of master or crew. It would seem that this does not include the act of the purser of the vessel.[3] The fact that others not standing in any direct relation to the owner combined in the commission of the barratrous act, with the master or crew, does not affect its character. In Toumlin *v.* Anderson[4] a ship had on board a large number of prisoners of war. These combined with five of the mariners and captured the ship. This was a loss by barratry.[5] The privity of the freighter to the barratrous act does not affect its character;[6] nor does the fact of the subsequent condemnation of the cargo by an enemy's prize court create a presumption that the loss was in reality by capture and not through barratry.[7] Barratry may be committed by the master in respect to the cargo, though the owner of the cargo is at the same time owner of the ship

try; if for the owners' exclusive advantage this is clearly not barratry. In the case at bar the advantage of both was sought. This cannot be held to be barratry.

[1] Vallego *v.* Wheeler, 1 Cowper, 143.

[2] Lawton *v.* Sun Mutual Ins. Co., 2 Cush. (56 Mass.) 500.

[3] Spinetti *v.* Atlas S. S. Co., 14 Hun (N. Y.), 100; but see S. C., 80 N. Y. 71.

[4] 1 Taunt. 227.

[5] Also Toumlin *v.* Inglis, 1 Camp. 421.

[6] Unless, of course, the privity of the ship-owner can be also shown. Boutflower *v.* Wilmer, 2 Selwyn's *Nisi Prius*, 96 (21 Geo. II.).

[7] Goldschmidt *v.* Whitmore, 3 Taunt. 508.

and though the master is also the supercargo or consignee for the voyage.[1]

§ 209. The barratrous act must be prejudicial to and without the knowledge of the owner.[2] It is not essential that the barratry should be to the interest of the master[3] and, on the other hand, in Earle *v.* Rowcroft[4] the doctrine is laid down that an intention to injure the owner, or to gain at his expense, need not be shown. It is enough if the act prove to be a breach of the trust reposed and to the owner's injury.[5]

§ 210. It follows as a corollary from what has been said, that a master who is an owner cannot commit barratry.[6] A master who has control of the vessel under a charter-party cannot commit barratry.[7] The same rule holds as to a master who is a part owner,[8] or who hires a vessel for a stated period, rendering to the owner a portion of the profits.[9] Where, however, M. chartered a vessel to A. and B. for a particular voyage, reserving

[1] Cook *v.* Commercial Ins. Co., 11 Johns. (N. Y.) 40.

[2] Nutt *v.* Bourdieu, 1 T. R. 323; Croussillat v. Ball, 4 Dall. 294; Ward *v.* Wood, 13 Mass. 539. The privity of the owner will not, however, be disaffirmed by the mere fact that the master has sworn that a vessel, condemned for a breach of blockade, was really bound for another destination. Everth *v.* Hannam, 6 Taunt. 375.

[3] Dederer *v.* Delaware Ins. Co., 2 Wash. C. C. 61. The presumption is that a fraudulent act was for the benefit of the master. The insured need not affirmatively show it to have been so. Kendrick *v.* Delafield, 2 Caines (N. Y.), 67.

[4] 8 East, 126.

[5] This case is apparently opposed to the principle (stated above) that a wrongful intent is necessary to constitute barratry. Perhaps the two principles are to be reconciled by stating that in case of injury, where the intent to injure has been wanting, the wilfulness is to be implied, from the fact that the master had no right to infer that the owner would desire or assent to a breach of the law even for his own benefit. See Parsons on Marine Insurance, Vol. I., p. 567 (Ed. 1868).

[6] Nutt *v.* Bourdieu, 1 T. R. 323.

[7] Marcardier *v.* Chesapeake Ins. Co., 8 Cranch, 39.

[8] Wilson *v.* General Mutual Ins. Co., 12 Cush. (66 Mass.) 360; Jones *v.* Nicholson, 10 Exch. 28; 1 Phillips on Ins., § 1082; Ross *v.* Hunter, 4 T. R. 33.

[9] Hallet *v.* Columbian Ins. Co., 8 Johns. (N. Y.) 272; Taggard *v.* Loring, 16 Mass. 336.

It is not incumbent on the insured to prove that the master was not the owner. That must be shown by the insurer. A fraudulent sale and purchase by the owner will not make him the owner, so as to afford a defence to a claim for a loss by his barratry. Steinbach *v.* Ogden, 3 Caines, 1.

certain privileges and half the cabin for the master and mate and covenanting to hire and pay the master and crew and furnish them with all provisions, etc., and, at the request of B. who was on board, the master deviated from his course and was captured by a Spanish privateer, this was held to be barratry, in that M. was still the owner of the ship.[1] Barratry cannot be committed by a master who has the equitable title to the vessel.[2]

§ 211. The act of the owner himself may sometimes be barratry. If a vessel is owned by two persons and one as part owner commit the barratrous act, this will not defeat the right of the other to recover his portion on the grounds under consideration.[3] Where, too, the owner places the vessel under the sole control of the freighter, any act of the owner in defraud of the freighter, as wilfully running the ship ashore, is barratry.[4] Negligence on the part of the insured is a good defence to the allegation of barratry, but it is incumbent on the insurer to prove such negligence. The insured does not have to prove the negative.[5] The negligence may be constructive, as where the plaintiff was presumed to have negligently permitted smuggling, from the fact that he had ample opportunity to know that it was being carried on.[6]

§ 212. Loss by "collision" is said to be included in the exception perils of the seas. By this is meant loss by unavoidable collision to which the negligence of the carrier has in no way contributed.[7]

There are four possible conditions respecting negligence

[1] McIntyre *v.* Bowne, 1 Johns. (N. Y.) 229.

[2] Barry *v.* Louisiana Ins. Co., 11 Mait. La. 630.

[3] Strong *v.* Martin, 1 Dunl. Bell and Mur. Sess. Cas. 1245. But see cases before cited.

[4] Soares *v.* Thornton, 7 Taunt. 627.

[5] American Ins. Co. *v.* Bryan, 26 Wend. (N. Y.) 563; Stone *v.* National Ins. Co., 19 Pick. (36 Mass.) 34.

[6] Pipon *v.* Cope, 1 Camp. 434.

[7] Smith *v.* Scott, 4 Taunt. 125; The Kathleen, 43 L. J. Adm. 39; Lloyd *v.* General Iron Screw Collier Co., 10 L. T., N. S. 586; S. C., 12 W. R. 882; 10 Jur., N. S. 661; 33 L. J. Exch. 269; 3 H. & C. 284; Plaisted *v.* Boston, etc., S. Nav. Co., 27 Me. 132; Hays *v.* Kennedy, 41 Pa. St. 378; S. C., 3 Grant (Pa.), 351; Van Horn *v.* Taylor, 7 Rob. La. 201; The New Jersey, Olcott, 444; Peters *v.* Warren Ins. Co., 14 Pet. 99; Marsh *v.* Blythe, 1 McCord, 360.

under which collision may occur. First, when the master or crew of each of the colliding boats has been guilty of negligence. Second, where the accident is due to the negligence of the master or crew of the boat on board which are the goods. Third, where the accident is due to the negligence of the master or crew of the other vessel. Fourth, where there is no negligence on either side and the loss is strictly unavoidable.[1]

Clearly the carrier cannot take refuge under the exception under consideration or under the exception "Perils of the sea" to escape his liability for a loss coming under either the first[2] or the second[3] head. It is equally clear, on the other hand, that these exceptions will exonerate the carrier from liability for losses of the fourth class.[4]

§ 213. As to the third class, however, there has been some question. The American cases are all to the effect that an innocent carrier will in such case of loss be exonerated under the exception "perils of the sea," no matter what negligence may be imputed to the other carrier.[5] Mr. Lawson in his work on Contracts of Carriers[6] while admitting the law to be as stated in these cases, criticises its soundness on the ground that the injured carrier has himself a remedy over against the vessel inflicting the injury and he cites an opinion by Lord Kenyon, in Buller *v.* Fisher[7] (1800), in which the phrase "perils of the sea" is made to include only "misfortune happening during the voyage, which human prudence could not guard against . . . . accidents happening without fault in either party," and hence, by implication, perhaps, to exclude the class of accidents under consideration. This case is not supported by the other

[1] The Woodrop, 2 Dods. Ad. Rep. 83; Leggett on Bills of Lading, p. 209.

[2] Lloyd *v.* General Iron Screw, etc., Co., *supra;* Grill *v.* Same, L. R. 1 C. P. 600; S. C., 12 Jur. N. S. 727; 35 L. J., C. P. 321; 14 W. R. 893; affirmed, L. R. 3 C. P. 476.

[3] Convers *v.* Brainard, 27 Conn. 607; Angell on Carriers, § 166, note a.

[4] Plaisted *v.* Boston, etc., S. Nav. Co., 27 Me. 132; The New Jersey, Olcott, 444; Marsh *v.* Blythe, 1 McCord, 360.

[5] Van Horn *v.* Taylor, 7 Rob. 201; 2 La. Ann. Rep. 587; Hays *v.* Kennedy, 41 Pa. St. 378; S. C., 3 Grant (Pa.), 351; Whitesides *v.* Thurkill, 12 S. & M. 599.

[6] § 165, p. 232.

[7] 3 Esp. 67.

English decisions,[1] nor is the reason given for its soundness, convincing. Whatever may be the interpretation of the phrase, "perils of the sea," with respect to accidents of this sort, there can be but little doubt that the exception "collision" when included in a bill of lading, embraces all accidents of that nature not attributable to the negligence of the carrier. In The Sun Mutual Insurance Company *v.* The Mississippi Trans. Company,[2] the carrier was the owner of a line of barges, in one of which the goods of the plaintiff were to be conveyed. Through carelessness in the manœuvering of the defendant's tug boats in getting the barges together preparatory to starting, a collision ensued by which the plaintiff's goods were damaged. Collision was among the excepted perils. The court held that the loss was not covered by this exception.

§ 214. The obligation to protect the goods after damage by collision rests on the carrier, as in the cases of loss falling within the other exceptions. In Notara *v.* Henderson,[3] the plaintiffs shipped beans from Alexandria for Glasgow. While in the intermediate port of Liverpool, the carrier's ship met with damage by collision. The beans were wetted by sea-water and the ship remaining only a few days at Liverpool, it was impossible to dry them. The plaintiffs objected to the beans being taken on to Glasgow in their then condition and offered to receive the goods and pay freight *pro rata* to Liverpool. Defendants insisted on full freight and carried the beans to Glasgow, where they arrived in a damaged condition. It was held that the plaintiffs were entitled to recover.

§ 215. The mere proof of the happening of a collision is not, however, evidence of negligence. It is necessary for the party suing a carrier protected by the exception to give evidence of the absence of reasonable care or maritime skill on the carrier's part. Where doubt exists as to the cause of the accident, the

[1] Smith *v.* Scott, 4 Taunt. 125; Wilson *v.* Xantho, L. R., 12 App. Cas. 503; Peakes, C. 183; 2 Arnould on Insurance, 804; Abbot on Shipping, Pt. III., ch. iv., § 5, 5th ed. See Story on Bailments, §§ 512, 514.

[2] 4 McCrary, 636. See also Wilson *v.* Xantho, L. R., 12 App. Cas. 503.

[3] L. R., 52 B. 346; S. C., 41 L. J., 2 B. 158.

court will prefer to regard it as falling within the exception.[1] If the goods were at the time of the accident stowed on deck and but for this fact, would not have been injured, it would seem that the liability of the carrier depends largely upon the question of the knowledge and consent of the shipper to that sort of stowage and that unless such consent can be shown the carrier is liable.[2] Where negligence is alleged, it is no defence for the carrier to set up that the colliding vessel was also in fault.[3] In such case it would seem that both vessels may be held liable and in "The Milan"[4] it is said that an innocent shipper may recover in the English Admiralty the sum total of damage jointly from the two colliding vessels, in equal shares, and may sue, either under the old law of the Admiralty or under the Merchants' Shipping Act of 1854 (17 and 18 Vict. C. 104). It has been further held that the ninth section of the latter act, limiting the damages recoverable to the value of the ship, does not apply to a foreign ship, which is to blame for a collision and that her owners are responsible to the extent of the damage done, though exceeding the value of the ship and freight.[5] The measure of damage for goods lost in collision, it is said, is the price paid at the port of shipment, plus the expense of loading them on board and the expense of navigating the vessel to the place of collision, together with interest on such account from the date of the collision.[6]

[1] The Shannon, 1 W. Rob. 463; The Ebenezer, 2 ib. 206; The Mary Stewart, ib. 244; Hammack *v.* White, 31 L. J., C. P. 129; Scott *v.* London Dock Co., 34 L. J., Ex. 220.

[2] Van Horn *v.* Taylor, 2 La. Ann. Rep. 587; Daggett *v.* Shaw, 3 Mo. 189.

[3] Angell on Carriers, § 166 N. A.; Converse *v.* Brainerd, 27 Conn. 607.

[4] 31 L. J. Adm. 111.

[5] Cope *v.* Doherty, 4 Jurist, N. S. 699; The Victor, 29 L. J. Adm. 110; 2 L. T., N. S. 331.

[6] The Ocean Queen, 2 Asp. Mar. Law Cas. 419; 1 W. Robinson, 457.

CHAPTER XV.

EXCEPTIONS CONTINUED—DANGERS OF THE ROADS—ESCAPES—VICIOUSNESS—UNRULY ANIMALS—FIRE.

"Dangers of Roads," "Risk of Boats," § 216.
"Escapes, Viciousness, Injuries to unruly animals," § 217.
"Escapes," etc., degree of care, § 218.
Consent of the owner as to manner of shipment does not relieve from consequences of negligence, §§ 219, 220.
Carrier is bound to prevent escapes, § 221.
Carrier is not liable when consignee is not ready to receive live stock, § 222.
"Fire," generally, § 223.
What is loss by fire, § 224.
To fire merely an incident to other loss the exception does not apply, § 225.
Exception does not relieve for consequences of negligence, § 226.
Burden of proving the loss within the exception, § 227.
Doctrine in Ohio, § 228.
Rule in Federal Courts, § 229.
Exception to be strictly interpreted, § 230.
Exception co-extensive with liability, § 231.
Legislation affecting the exception fire, §§ 232, 233.

§ 216. THE phrase, "dangers of the roads," is somewhat ambiguous. In De Rothschild *v.* Royal Mail Steam Packet Company[1] it was said that the word "roads" in this connection is ordinarily to be construed to mean marine roads or harbors, but where it is applied to land carriage it may mean such dangers as are immediately caused by the condition of highways on land, as the overturning of carriages in rough or precipitous places. In this case goods were received by the defendants at Panama to be delivered in London. The evidence showed that the property had been placed in a railway truck at Southampton and was stolen without violence while in transit to London. It was said that the exception did not contemplate or include loss by theft. The application of the phrase to carriage by rail does not seem, as yet, to have been made.

[1] 21 L. J. Ex. N. S. 273; S. C. 7 Exch. 734.

In the other meaning of the exception, as including such dangers as are incident to roadsteads or harbors, the addition of the phrase to the ordinarily excepted perils of the bill of lading seems unnecessary. In Transportation Company *v.* Downer[1] it is said that dangers incident to the shallowness of water at the entrance of a harbor are included, in the absence of negligence on the part of the carrier, within the exception "dangers of lake navigation."

An interesting query arises in this connection. Do the exceptions, perils of the sea, dangers of roads and the like, extend to the transfer of goods in port into smaller boats for the purpose of loading or unloading them? In St. Louis, etc., R. R. Co. *v.* Smuck,[2] where goods were destroyed while in a wharf-boat, it was said by the court that the voyage had not yet begun and that the exception "dangers of the river" did not apply. In the case of Johnston *v.* Benson,[3] decided in 1819, it appeared that the phrase "risk of boats, so far as ships are liable thereto, excepted," occurred in the bill of lading and that the carrier was held under it to be exempt. Here, the voyage was to Jamaica and the goods had to be taken off in small boats belonging to the ship. The court, nevertheless, said that the phrase was unnecessary and that "the ship-owner engaged in such a trade as the West Indian, incurs no greater or other liability with regard to goods in the boats, than exists in respect to those in the ships."

In an Indian case where the consignee had not boats alongside ready to take delivery of his goods upon the vessel dropping anchor and where the bill of lading provided that "the goods on arrival at their port of destination are to be delivered into the receiving ship or to be landed at the consignee's expense, the ship-owner's liability ceasing as soon as they were delivered from the ship's tackle," and where, upon arrival of the ship at the port, the goods were put into other boats, one of which, through the negligences of the boatmen, was swamped and the contents damaged, the ship-owner was

[1] 11 Wall. 129.

[2] 49 Ind. 302.

[3] 4 Moore, 90; S. C. 1 B. & B. 454.

held not to be liable, unless it was shown that he had failed to take reasonable and proper care in the selection of boats.[1]

§ 217. The question whether carriers of live animals are common carriers has been much discussed. It would seem that in England,[2] in Kentucky[3] and in Michigan,[4] they are not so to be regarded, though elsewhere in the United States they are to be considered as subject to the common law liability.[5] It is agreed, however, on all sides that the carrier of animals cannot, even at the common law, be held for damage or loss growing out of the vices or propensities of the animals carried[6] and Mr. Justice WILLIS suggests that the question whether the carrier of animals is, or is not, truly a common carrier has become simply a quibble about names.[7] To this a learned author takes exception, asserting that the question is

[1] Leggett on Bills of Lading, p. 218; Bullock *v.* Toay Anny, 24 Cal. W. R. C. R. 74.

[2] Palmer *v.* Grand Junction Ry. Co., 4 M. & W. 749; Carr *v.* Lancashire, etc., Ry. Co., 7 Exch. 712; Chippendale *v.* Yorkshire, etc., Ry. Co., 15 Jur. 1106; Clarke *v.* Rochester Ry. Co., 4 Kern. 570; McManus *v.* Lancashire, etc., Ry. Co., 4 H. & N. 328; same, 2 ib. 693; Pardington *v.* South Wales Ry. Co., 38 Eng. L. & Eq. Rep. 432.

[3] Louisville, etc., R. R. Co. *v.* Hedger, 9 Bush (Ky.), 645; Hall *v.* Renfro, 3 Metc. (Ky.) 51.

[4] Lake Shore, etc., R. R. Co. *v.* Perkins, 25 Mich. 329; Michigan, etc., R. R. Co. *v.* McDonough, 21 Mich. 165.

[5] Penn *v.* Buffalo, etc., R. R. Co., 49 N. Y. 204; Cragin *v.* New York, etc., R. R. Co., 51 N. Y. 61; Mynard *v.* Syracuse, etc., R. R. Co., 7 Hun (N. Y.), 399; Clarke *v.* R. & S. R. R. Co., 14 N. Y. 570; Harris *v.* Northern, etc., R. R. Co., 20 N. Y. 232; Conger *v.* Hudson River R. R. Co., 6 Duer (N. Y.), 375; Ritz *v.* Pennsylvania R. R. Co., 3 Phila. 82; Powell *v.* Pennsylvania R. R. Co., 32 Pa. St. 414; Wilson *v.* Hamilton, 4 O. St. 722; Welsh *v.* Pittsburgh & R. R. Co., 10 O. St. 65; Evans *v.* Fitchburg R. R. Co., 111 Mass. 142; Ohio, etc., R. R. Co. *v.* Dunbar, 20 Ill. 623; St. Louis, etc., R. R. Co. *v.* Dorman, 72 Ill. 504; Kimball *v.* Rutland, etc., R. R. Co., 26 Vt. 247; Rixford *v.* Smith, 52 N. H. 355; S. & N. Ala. R. R. Co. *v.* Henlein, 56 Ala. 368; East Tennessee, etc., R. R. Co. *v.* Whittle, 27 Ga. 535; Agnew *v.* The Contra Costa, 27 Cal. 425; Kansas, etc., R. R. Co. *v.* Reynolds, 8 Kan. 623; Kansas, etc., R. R. Co. *v.* Nicholls, 9 Kan. 235; McCoy *v.* Keokuk, etc., R. R. Co., 44 Ia., 424; Atchison, etc., R. R. Co. *v.* Washburn, 5 Neb. 117.

[6] Cases cited above.

[7] Great Western Railway Co. *v.* Blower, 20 W. R. 776.

of importance in determining the burden of proof.[1] However this may be, it is evident that where the bill of lading contains such exceptions as "escapes, viciousness, injury to unruly animals," the distinction is not of practical value.

Certain it is, moreover, that whether these exceptions be expressed or not the carrier of animals is not an insurer against injuries or loss resulting from the vice inherent in the animals themselves, which could not have been prevented by foresight and diligence. In other words the carrier is not liable for loss occasioned by the escape or by the viciousness of the animals carried, except when his own neglect has contributed to the result.[2] So where animals are sent over a railroad the company is liable for any injury they may sustain, either by the improper construction of the cars or the want of reasonable equipments or the improper position of the car in the train.[3]

§ 218. The language of Mr. Justice WILLIS in the case of Blower *v.* Great Western Railway Company,[4] already referred to, is of interest, as indicating what degree of care is required of the carrier. The action was for the loss of a bullock belonging to the plaintiff, which, in transportation, escaped from the

[1] Lawson on Contracts of Carriers, § 16.

[2] This is by the same principle which exempts carrier from responsibility for loss from the inherent defects of merchandise. Clarke *v.* R. & S. R. R. Co., 14 N. Y. 570; Penn *v.* B. & E. R. R. Co., 49 N. Y. 204; Evans *v.* Fitchburg R. R. Co., 111 Mass. 142; McCoy *v.* The Keokuk, etc., R. R. Co., 44 Ia. 424; Rixford *v.* Smith, 52 N. H. 355. It is here implied that the common method of carrying cattle is *per se* negligent. Ohio, etc., R. R. Co. *v.* Dunbar, 20 Ill. 623; Clarke *v.* Rochester, etc., Ry. Co., 4 Kern. 570; 1 S. & N. Ala. R. R. Co. *v.* Henlein, 56 Ala. 368; Adams Ex. Co. *v.* Nock, 2 Duv. 562; Louisville, etc., R. R. Co. *v.* Hedger, 9 Bush (Ky.), 645; Hawkins *v.* Great Western R. R. Co., 17 Mich. 51; Great Western R. R. Co. *v.* Hawkins, 18 ib. 427.

[3] Angell on Carriers, § 214, citing Walker *v.* London Ry. Co.; Kingston Spring Assizes (1843), cited in Walf. Sum. of Law of Railways, 305; Palmer *v.* Grand Junction Railroad Co., 4 M. & W. 749; *contra*, Cragin *v.* New York Central R. R. Co., 51 N. Y. 61; Nicholas *v.* New York Central R. R. Co., 4 Hun (N. Y.), 327; Betts *v.* Farmers' Loan, etc., Co., 21 Wisc. 80; Hord *v.* Grand Trunk Ry. Co., 20 Upper Canada, C. P. 361; Gannell *v.* Ford, 5 L. T. N. S. 604; Chippendale *v.* Yorkshire, etc., Ry. Co., 15 Jur. 1106.

[4] 7 L. R. C. P. 655; S. C., 20 W. R. 776.

truck in which it was being carried. The opinion of the court is in these words: "Mr. Bosauquet says it is not found that the company might not have provided such trucks that no bullock could escape under any circumstances during the journey. The judge finds that the truck was reasonably fit for the conveyance of the animal. We cannot be led from that finding by a suggestion that some possible form of truck might be devised which would prevent the recurrence of such an accident. I think the finding excluded the notion of negligence on the part of the company or of the escape of the bullock from any other cause than from its own inherent vice or restiveness or frenzy and for such an injury the company are not liable."

To the same effect is Illinois Central Railroad Company *v.* Hall.[1] Here the bill of lading provided that the carrier should not be liable for the hogs (the stock shipped) jumping from the car. The shippers had selected the cars to be used, which did not belong to the carrier, but to another railroad company. The hogs escaped by reason of the imperfect door fastenings of the cars. It was held that if the carrier did not know of the defects when the shippers selected the cars he could not be held for the loss.

§ 219. The consent of the owner of the stock to a particular method of shipment will not necessarily exonerate the carrier from the consequences of negligence. In Welsh *v.* Pittsburgh, etc., R. R. Company[2] the bill of lading set forth that the shipper had examined the cars and assumed "all risk arising from any defect in the body of the car, imperfect doors and fastenings, overloading, or from vicious and restive animals, delays, or from any other cause or thing not resulting from defective trucks, wheels, or axles." Here, too, the fastenings of the doors of the cars were defective and the animals

[1] 58 Ill. 409. But see Oxley *v.* St. Louis, etc., R. R. Co., 65 Mo. 629.

[2] 10 O. St. 65. So, too, in Indianapolis, etc., R. R. Co. *v.* Allen (31 Ind. 394), the bill of lading including the exception "*escaping.*" Several of the animals, hogs, escaped through an open window in the car and it appeared that after only one had escaped the shipper had requested the conductor of the train to fix the window, which request was not complied with. The carrier was held liable.

escaped, but it was held that the carrier should have provided perfect cars and was liable, the exceptions in the contract to the contrary notwithstanding.

§ 220. Where straw or other combustible material is used for the bedding of live stock and the animals are injured by this catching fire, the carrier is liable, though the agent of the plaintiff was present at the time the objectionable material was placed in the car.[1] In Pratt *v.* Ogdensburg, etc., Railroad Company[2] it is said that the fact that the shipper knew the car in which the carrier proposed to ship the goods was unsafe, does not avail the carrier as an excuse for using such cars and the Supreme Court of the United States have apparently approved of this proposition.[3] That the owner of the stock, or his servant, has been allowed passage on the train, so that he may look after the condition of the animals, will not conclusively exonerate the carrier. Assuredly, the carrier will not be liable if the stock is lost through the carelessness of the attendant,[4] but the carrier cannot, on such a pretext, evade the liability for his own negligence.[5] Even where the neglect of the attendant, or the viciousness of the animals, has contributed to the loss, the carrier may be held responsible.[6] *Causa proxima non remota spectatur.* In Rhodes *v.* Louisville, etc., Railroad Company,[7] loss "by viciousness of the animals" was included among the exceptions of the bill of lading. It was held that the proof of viciousness would not exonerate the carrier if the cars in which the cattle were placed were defective. In Gill *v.*

[1] Powell *v.* Penna. R. R. Co., 32 Pa. St. 414.

[2] 102 Mass. 557.

[3] Ogdensburg, etc., R. R. Co. *v.* Pratt, 22 Wall. 133. Where an entire car is chartered to a person for his cattle, and he (the shipper) has charge of the loading of the car, the company is not liable for a damage sustained by improper loading. East Tenn. R. R. Co. *v.* Whittle, 27 Georgia, 535. If the car is defective the company is liable on the contract to hire, but not as a carrier.

[4] Wilson *v.* Hamilton, 4 O. St. 723.

[5] Smith *v.* New Haven, etc., R. R. Co., 12 Allen (Mass.), 531; Conger *v.* Hudson River R. R. Co., 6 Duer (N. Y.), 375; Harris *v.* Northern Indiana R. R. Co., 20 N. Y. 232; Ohio, etc., R. R. Co. *v.* Dunbar, 20 Ill. 623; Hall *v.* Renfro, 3 Metc. (Ky.) 51; Wilson *v.* Hamilton, 4 O. St. 723.

[6] Cases foregoing.

[7] 9 Bush (Ky.), 688.

Manchester, etc., Railway Company[1] the carrier was by contract released from liability for loss or injury in the delivery of the cow shipped by plaintiff, occasioned by "kicking, plunging, or restiveness." When the cow arrived at the place of destination a servant of the defendants was about to unfasten the car when he was warned not to do so. He persisted. The animal ran out and after rushing about the yard violently for some time ran upon the railway tracks and was killed by a passing train. The court held that the carrier was liable.

§ 221. The carrier is bound to provide against escapes by seeing that the stock is properly secured. Where a dog was delivered to be carried, but not being properly fastened, slipped the noose about his neck and broke loose, the carrier was held responsible and Lord Ellenborough said that since the carrier had the means of seeing that the dog was insufficiently tied, he was bound to lock up the animal or take other proper means to secure it.[2]

In an extreme case in Mississippi the defendant was the keeper of a public ferry, while the plaintiff was the owner of a stage coach and horses, which were being transferred across the ferry for hire. The driver had vacated his seat and fastened the lines. The horses became restive and ran out of the boat into the river. The carrier was held liable.[3] This is, however, in the line of the case of Porterfield *v.* Brooks,[4] in Tennessee, where it was said that if a horse escape from the fastenings on board a steamboat and be lost in the river, the owners of the boat are responsible, for the horse must have been negligently fastened or the loss would not have occurred, and *prima facie*

[1] L. R. 8 Q. B. 186.

[2] Stuart *v.* Crawley, 2 Stark. 323. In Richardson *v.* Northeastern Ry. Co., L. R. 7 C. P. 75, this case is distinguished. Here the plaintiff had shipped a dog, secured, as is customary, by a collar and strap, but the animal had, nevertheless, broken loose, and escaped. Willis, J., held that the defendants were not liable, and that the case differed from Stuart *v.* Crawley. First, because in the earlier case the defendants were common carriers, and in the case at bar they were not. Second, because in the earlier case the carrier had the means of seeing that the animal was insufficiently secured, whereas here the mode of securing the dog was that ordinarily adopted.

[3] Powell *v.* Mills, 37 Miss. 691.

[4] 8 Humph. (Tenn.) 497.

this negligence is attributable to the owners of the boat or their servants.

The carrier's liability will, however, not be assumed.[1] In Kendall *v.* London, etc., Railway Company[2] the plaintiff delivered to the defendants a horse to be carried by their railway. At the end of the journey the horse was found to be injured. No accident had happened to the train and the defendants were guilty of no negligence. The cause of the injuries was unknown, except that from their nature they appeared to have been caused by the horse getting down upon the floor of the horse box. The horse was quiet and accustomed to travel by rail. It was held by a divided court that the defendants were not liable since it was to be inferred that the injuries resulted from the proper vice of the animal.

§ 222. The carrier is not liable for the loss or injury to live stock arising from the negligence of the owner in not being at the place of destination to receive the animals. Where a horse was sent by railway and the sender signed a contract in the following terms: "Mr. Wise paid for one horse 12s. 6d., Newbury to Windsor. *Notice*—The directors will not be answerable for damage done to any horse conveyed by this railway," and the horse arrived at Windsor station in safety, but the owner did not appear to claim it and it was forgotten and left tied in a horse box in an exposed situation for twenty-four hours and was injured by the neglect, it was held that though the company was, to a certain extent, blamable, they were freed under the contract.[3]

The case of Nugent *v.* Smith[4] has been already commented upon. Here the loss of a mare on shipboard was due partly to the tossing of the vessel and partly to the struggles of the frightened animal. The court below, Mr. Justice Bret, delivering the judgment, refused to consider this loss the act of God, or "such a vice in the inherent nature of this particular mare as would absolve the defendant," but on appeal this judgment was

[1] Morrison *v.* Construction Co., 44 Wisc. 405, and cases following.

[2] L. R. 7 Ex. 373.

[3] Wise *v.* Great Western Ry. Co., 25 L. J. Ex. 258.

[4] L. R. 1 C. P. D. 19, 423.

reversed and the carrier was exonerated. In Gabay *v.* Lloyd,[1] where horses were being transported by water and during a severe storm, they broke down the partitions separating them and by kicking severely injured each other. This was held to fall within the exception "perils of the sea."[2]

§ 223. There are numerous rulings to the effect that "fire" is not to be considered as among the causes of loss covered by the common law exception, "the act of God," except in the one case of fire caused by lightning.[3] Neither is it included in the more comprehensive exceptions usually expressed in bills of lading as "unavoidable dangers,"[4] "perils of the sea,"[5] "perils of the river[6] (or road)," etc. It is therefore necessary that to free the carrier from responsibility for this sort of loss an express exception to that effect should be introduced into the bill of lading.[7]

[1] 3 B. & C. 793; Lawrence *v.* Aberdeen, 5 B. & Ald. 107.

[2] The owner of a horse, injured while in the carrier's hands, may maintain an action against the carrier for the injury, notwithstanding he (the shipper) has not given him (the carrier) notice of the injury, or offered the horse to him to be cared for. Evans *v.* Dunbar, 117 Mass. 546.

[3] Story on Bailments, §§ 511, 528; Abbott on Shipping, *p. 389 (7th Am. ed.) and cases cited; Forward *v.* Pittard, 1 T. R. 27; Hyde *v.* Trent. Nav. Co., 5 ib. 389; Thorogood *v.* Marsh, 1 Gow. N. P. C. 105; Gatliffe *v.* Bourne, 4 Bing. N. C. 314; Parsons *v.* Monteath, 13 Barb. (N. Y.) 353; Miller *v.* Steam Nav. Co., 10 N. Y. 431; McArthur *v.* Sears, 21 Wend. (N. Y.) 190; Hall *v.* Cheney, 36 N. H. 26; Moore *v.* Mich. Cent. R. R. Co., 3 Mich. 23; Cox *v.* Peterson, 30 Ala. 608; Chevallier *v.* Straham, 2 Tex. 115; Patton *v.* Magrath, Dudley (S. C.), 159.

Fire started by the bursting of a steam boiler is not the "act of God." Bulkley *v.* Naumkeag Cotton Co., 24 Howard, 386; McCall *v.* Brock, 5 Strob. (S. C.) 119. Neither is fire caused by the machinery of the vessel. Hale *v.* New Jersey Steam Nav. Co., 15 Conn. 539; or by the bursting of a cask containing chloride of lime. Brousseau *v.* The "Hudson," 11 La. Ann. Rep. 427.

[4] Union Mutual Ins. Co. *v.* Indianapolis, etc., R. R. Co., 1 Disney (O.), 480.

[5] Merril *v.* Arey, 3 Ware (U. S. D. C.), 215.

[6] Cox *v.* Peterson, 30 Ala. 608; Gilmore *v.* Carman, 1 S. & M. (Miss.) 303; Garrison *v.* Memphis Ins. Co., 19 Howard, 312; New Jersey Steam Nav. Co. *v.* Merchants' Bank, 6 ib. 344.

In Sampson *v.* Gazzam, 6 Porter (Ala.), 123, it was said that it is admissible to prove that the phrase "dangers of the river" by custom and general understanding includes a loss by fire. See also Hibler *v.* McCartney, 31 Ala. 501.

[7] Faulkner *v.* Hart, 82 N. Y. 413; S. C. 37 Am. Rep. 574, reversing

The effect of such an exception is to relieve the carrier from liability in all cases of loss by fire except for such loss as is directly traceable to his own or his servant's negligence.[1] It

Faulkner *v.* Hart; Moore *v.* Mich. Central R. R. Co., 3 Mich. 23; Parker *v.* Flagg, 26 Me. 181; Plaisted *v.* Boston, etc., S. N. Co., 27 ib. 135.

In Menzell *v.* R. R. Co., 1 Dillon's C. C. 531, there was a special contract for the transportation of the plaintiff's goods, which provided, *inter alia:* "I hereby release said company from any and all damage that may occur to said goods arising from leakage or decay, chafing, or breakage, or from any other cause not the result of collision of trains or of cars being thrown from the track while in transit." Judge Dillon said: "Construing this general and indefinite language conformably to the rules adopted by courts in the interpretation of contracts of this kind, it is my opinion that it does not plainly or satisfactorily appear therefrom that the parties intended thereby to exempt the company from liability for a total loss or destruction of the goods by fire, even though the fire were accidental and without fault on the part of the company, its agents, or servants." Ching Hong & Co. *v.* Seng Moh & Co., 3 L. R. 4 Col. Ser. 736.

In an action brought to recover the value of cotton destroyed by fire, where no bill of lading had been given, the Illinois Supreme Court excluded evidence of a usage long standing on the defendants' (a large railroad corporation) part, and well understood by the shippers at the point in question, to give bills of lading exempting themselves from liability for fire. Illinois Central R. R. Co. *v.* Smyser, 38 Ill. 354.

The opinion of Cowen, J., in Gould *v.* Hill, 2 Hill (N. Y.), 623, that carriers cannot limit their liability for loss by fire by express agreement, was specifically overruled in New York nine years later in Parsons *v.* Monteath, 13 Barb. (N. Y.) 353.

[1] York Co. *v.* Central R. R. Co., 3 Wall. 107; Muser *v.* Holland, 17 Blatch. 412; Insurance Co. of North America *v.* St. Louis, etc., R. R. Co., 3 McCreary, 233; Scruggs *v.* B. & O. R. R. Co., 5 ib. 590; Mercantile Insurance Co. *v.* Chase, 1 E. D. Smith (N. Y.), 115; Manhattan Oil Co. *v.* Camden, etc., R. R. Co., 54 N. Y. 197; Germania Fire Ins. Co. *v.* Memphis, etc., R. R. Co., 72 ib. 90; Whetworth *v.* Erie R. R. Co., 87 ib. 414; Farnham *v.* Camden, etc., R. R. Co., 55 Pa. St. 53; Colton *v.* Cleveland, etc., R. R. Co., 67 ib. 211; Grace *v.* Adams, 100 Mass. 505; Pemberton Co. *v.* New York Central R. R. Co., 104 ib. 144; Erie R. R. Co. *v.* Wilcox, 84 Ill. 239; Merchants', etc., Transportation Co. *v.* Leyser, 89 Ill. 43; Union Express Co. *v.* Graham, 26 O. St. 595; U. S. Express Co. *v.* Blackman, 28 ib. 144; Michigan Southern, etc., R. R. Co. *v.* Heaton, 37 Ind. 448; Montgomery, etc., R. R. Co. *v.* Edmonds, 41 Ala. 667; New Orleans Mutual Ins. Co. *v.* New Orleans, etc., R. R. Co., 20 La. Ann. Rep. 302; Levy *v.* Pontchartrain R. R. Co., 23 ib. 477; New Orleans, etc., R. R. Co. *v.* Faler, 58 Miss. 911; Hunters *v.* "The Morning Star," Newfoundland, 270; Louisville, etc., R. R. Co. *v.* Oden, 80 Ala. 38; L. K. M. R. &

is immaterial whether the fire, if not the result of negligence, was unavoidable or not. Neither does the fact that the fire was the work of an incendiary or was due to the carelessness of strangers, affect the carrier's liability.[1] The existence of the exception in a bill of lading, however, in no way interferes with the ordinary liability of the ship-owner to contribute, as such, to general average when a fire occurs and a sacrifice is properly made to save the whole adventure.[2]

§ 224. What is "loss by fire?" Here, as with other exceptions, the doctrine of proximate cause obtains. That is "loss by fire" in which fire was the direct and immediate cause of damage. The fact that the fire was carried a great distance to the goods by an unusually high wind does not affect the question of loss to render it attributable to the wind rather than the fire.[3] Such a combination of circumstances will not bring the loss under the exception "the act of God."

Fire originated by an explosion of the boiler of the engine of the steamboat[4] or by an explosion among the cargo[5] is within the exception. The term includes fire however caused and is not restricted to fire originating in the boat's furnace.[6]

§ 225. Where, however, fire is merely an incident to loss by other means, the exception does not apply; as where the proximate cause of the loss was a collision and after the collision the wreck took fire.[7] It is upon this ground that the principle of the liability of the common carrier for negligence, in spite of the express exception, is to be maintained. The carrier excepts to be free from loss by fire, but where the damage is caused sec-

T. R. Co. *v.* Talbot, 47 Ark. 97; Louisville, etc., Ry. Co. *v.* Gilbert (Tenn.), 12 S. W. Rep. 1018.

[1] Colton *v.* Cleveland, etc., R. R. Co., 67 Pa. St. 211; Pennsylvania R. R. Co. *v.* Fries, 87 ib. 234; Werthemier *v.* Pennsylvania R. R. Co., 17 Blatchf. 421.

[2] Schmidt *v.* Royal Mail S. S. Co., 45 L. J. Q. B. Div. 646.

[3] Parsons *v.* Monteath, 13 Barb. (N. Y.) 353; Miller *v.* Steam Navigation Co., 10 N. Y. 431; Pennsylvania R. R. Co. *v.* Fries, 87 Pa. St. 234; Chevallier *v.* Straham, 2 Tex. 115.

[4] Bulkley *v.* Naumkeag Cotton Co., 24 Howard, 386; McCall *v.* Brock, 5 Strob. (S. C.) 119.

[5] Brousseau *v.* The "Hudson," 11 La. Ann. Rep. 427.

[6] Swindler *v.* Hilliard, 2 Rief (S. C.), 286.

[7] The "City of Norwich," 3 Ben. 575. Here the collision was caused by negligence, and the carrier was held liable on this ground.

ondarily by fire but primarily by his own or his servant's negligence the exception has properly no application.[1] It is not sufficient that negligence be merely shown. It must be shown to have been the proximate cause of loss.[2] It must be shown to have caused or to have at least contributed to the injury.[3]

§ 226. The exception "fire" will not relieve the carrier where negligence of himself or his employés has been shown. This is true even where, as in New York, it has been said that a carrier may by contract exclude his liability for negligence. Not having done so he is none the less liable than he would be if the law were as in other States.[4]

The question of what is negligence is not properly within the

[1] If the analogies of the law of insurance are to be followed, the carrier's exception will relieve him from liability for loss where the goods have been burned by the civil authorities through fear of contagious disease. Pattison *v.* Mills, 1 Dow & C. 342; 2 Bligh (N. S.), 519; Parsons on Marine Insurance, I., ch. xvii., § 4, p. 558, or where burned to save them from capture by the public enemy. Gordon *v.* Remmington, 1 Camp. 123. In the latter event it might be urged that the loss would fall rather under the exception, the public enemy, and that the carrier would be exempted by common law.

An interesting question in the law of insurance does not seem to have met with a corresponding development in respect to the carrier's liability under a bill of lading, namely: Does the exemption from liability for loss by fire also relieve him in the case of loss from the injurious effects of fire? The law with respect to the responsibility of an insurer, as shown by Mr. Parsons in his admirable treatise on Marine Insurance (p. 558 and cases cited), may be briefly stated thus: The term fire in a policy of insurance includes loss not merely by burning but also loss by the ordinary but not the extraordinary effects of fire. The ordinary effects of fire have been held to include injuries sustained from endeavors to arrest and to prevent fire (City Ins. Co. *v.* Corlies, 21 Wend. 367), as where goods are damaged by the water from engines. Case *v.* Hartford Ins. Co., 13 Ill. 676.

The fire, however, must be an actual conflagration. The phrase does not contemplate damage done by the heat of an excessive fire in a furnace or stove. Austin *v.* Drew, 4 Camp. 360.

But damage caused by an explosion of gunpowder is a loss by fire. Scripture *v.* Lowell Ins. Co., 10 Cush. (Mass.) 356.

[2] Chalk *v.* Charlotte, etc., R. R. Co., 85 N. C. 423.

[3] Cochran *v.* Dinsmore, 49 N. Y. 249.

[4] Stedman *v.* Western Transportation Co., 48 Barb. (N. Y.) 97; Lamb *v.* Camden, etc., R. R. Co., 2 Daly (N. Y.), 454; Same *v.* Same, 46 N. Y. 271; Condict *v.* Grand Trunk R. R. Co., 54 ib. 500; Little Rock, etc., Ry. Co. *v.* Talbot, 47 Ark. 97.

limits of this treatise. It has always been held to be a matter to be determined by the circumstances of each case.[1] It is, however, to be noted that the negligence which will render a carrier liable includes both the lack of due care in keeping the goods before the fire originated and the neglect to make all possible effort to save them after the fire broke out.[2]

Notice by the carrier to the shipper that he is about to commit

[1] It may, however, be not without practical value to append a list of decisions as to what is negligence in exactly this connection. The following acts or omissions have been decided to constitute negligence: A defect in the fitting up of a vessel, by which the fire was caused, Hunters *v.* The "Morning Star," Newfoundland, 270; the carrying bale cotton on open cars drawn by an engine not provided with a proper spark arrester, New Orleans, etc., R. R. Co. *v.* Faler, 58 Miss. 911; neglect to fulfil the terms of an agreement specifying that the goods shall be carried without transfer, Stewart *v.* Merchants' Trans. Co., 47 Ia. 229; the failure to protect cotton in transit as provided by Act of Congress of 25 July, 1866 (since repealed), Grey's Executors *v.* Mobile Trans. Co., 55 Ala. 387; not sending prompt notice to the consignee of the arrival of the goods, Union Steamboat Co. *v.* Knapp, 73 Ill. 506; but two days' notice is sufficient notice, and will relieve the carrier from the liability for negligence, Chalk *v.* Charlotte, etc., R. R. Co., 85 N. C. 423. Where the consignee lived about one hundred rods from the express office and was well known, and the goods were sent by a circuitous route and arrived late in the day, and no effort was made to inform the consignee or to deliver the goods; this was held to be negligence. Union Express Co. *v.* Ohleman, 92 Pa. St. 323.

Putting the plaintiff's goods in close proximity to a large quantity of powder is negligence, White *v.* Colorado Central R. R. Co., 5 Dillon, 428; but the erection of a steam cotton-press on the carrier's premises, by which the chance of fire was increased, is not *per se* negligence. Chalk *v.* Charlotte, etc., R. R. Co., 85 N. C. 423.

In the recent case of McFadden *v.* Mo. Pac. Ry. Co., 92 Mo. 343, it was held that the loss of mules by fire where they were shipped in a car bedded with straw next to the engine, and the straw ignited from sparks from the engine, was caused by the negligence of the company, which was liable, although the bill of lading contained an exemption from loss by fire.

If the vessel be shown to have been ordinarily well protected against fire, there is no presumption of negligence to be drawn from the fact that the vessel was on fire.

The employment of the phrase "loss by fire unless from *gross* negligence" seems in no way to change the carrier's responsibility. Adams Express Co. *v.* Sharpless, 77 Pa. St. 516. See also Southern Express Co. *v.* Kaufman, 12 Heisk. (Tenn.) 161.

[2] Erie R. R. Co. *v.* Lockwood, 28 O. St. 358.

an act of negligence will not relieve the former from liability. Thus, if placing goods on a flat car for transportation is negligence, it is no defence that notice of the intention to do so was given by the carrier at the time of shipment.[1]

§ 227. It is clear that the burden of showing a loss to have been within the exception is on the carrier himself. The fact of the destruction by fire must be proved by him.[2] Is the burden then shifted and does it then become incumbent on the plaintiff to prove the negligence of the carrier in order to entitle him to recover? It has been seen that in the case of the exception "the act of God," it may be stated as a general proposition that in England and in most of the States of the United States, the onus is not on the owner, while in Ohio, South Carolina, Georgia, Alabama, and Mississippi it has been expressly held that the burden of proving the absence of negligence is on the carrier himself. It remains to be considered whether any distinction in this respect is to be found between the exceptions mentioned and the exception "loss by fire." In Patterson *v.* Clyde,[3] Mr. Justice AGNEW distinctly affirms that such a distinction exists. He finds the reason for the law in the case of "perils of the sea (or river)," in the fact that without the proof of the circumstances it would be impossible to say whether the loss arose from the dangers of navigation or not. "Such a peril can only be known from its facts. The striking of the boat upon a stone or rock in the canal may or may not fall within the exception. For instance, if the stone from its position may be readily seen and avoided by those in the boat, or although not visible, yet if its situation be generally known the loss ought to be imputed to the fault of the captain or those showing the direction of the boat. But if, on the other hand, it was not known, and was invisible to the common eye, the loss occasioned by the boat striking upon it ought to be considered as coming within the exception which embraces all dangers of the navigation. Thus it is evident that a peril of navigation is a thing having no definite fact to rest

[1] Montgomery, etc., R. R. Co. *v.* Edmonds, 41 Ala. 667.

[2] Greenleaf on Evidence, II. § 219, and note; Alden *v.* Pearson, 3 Gray (69 Mass.), 342; Shaw *v.* Gardner, 12 ib. (78 Mass.) 488; Chicago, etc., R. R. Co. *v.* Moss, 60 Miss. 1003.

[3] 67 Pa. St. 500.

upon in the writing, but must be made to appear in the very facts of the loss. But not so as to a loss by fire, which is a specific thing, and determines at once the character of the loss. The fire is the very thing provided for in the exception, and when the loss is shown to have arisen from a fire which consumes vessel and cargo, the thing excepted is proved. This excepted peril is shown to have caused the loss and to add more to the evidence is to alter the terms of the contract."

§ 228. The Ohio doctrine is unquestionably opposed to this distinction.[1] "We have been requested to review this doctrine," said the Supreme Court of that State in U. S. Express Company *v.* Backman,[2] "in view of such respectable authority as hold the contrary to be the true rule. We think the weight of authority is in accord with the holding in Ohio, and we do not think public interests would be advantaged by a change of the rule."[3]

§ 229. The carrier is liable for loss by the negligence of his servant. The fact that the servant or agent was a corporation does not affect the question of liability. In Bank of Kentucky *v.* Adams Express Company the express company had contracted to carry the goods, "loss by fire" being among the exceptions. The goods were sent by train over the Louisville and Nashville Railroad in charge of a messenger of defendant and through the negligence of the railroad company, were destroyed by fire. In the Circuit Court it was held that the railroad company was

[1] Welsh *v.* P. F. W. & C. R. R. Co., 10 O. St. 69; U. S. Express Co. *v.* Graham, 26 ib. 595.

[2] 28 ib. 144.

[3] The onus is on the plaintiff (in case of fire). Wertheimer *v.* Penna. R. R. Co., 17 Blatchf. 421; Hall *v.* Penna. R. R. Co., 14 Phila. 414; Cochran *v.* Dinsmore, 49 N. Y. 249; Farnham *v.* Camden, etc., R. R. Co., 55 Pa. St. 53; Sherman *v.* Penna. R. R. Co., 8 W. N. C. 269; Colton *v.* Cleveland, etc., R. R. Co., 67 Pa. St. 211; Little Rock, etc., R. R. Co. *v.* Corcoran, 40 Ark. 375; Taylor *v.* Little Rock, etc., R. R. Co., 39 ib. 148; Little Rock, etc., R. R. Co. *v.* Talbot, ib. 523; Denton *v.* C. R. I. & P. R. R. Co., 52 Ia. 161; Sandy *v.* C. & N. W. R. R. Co., 30 Ia. 420; Union Steamboat Co. *v.* Knapp, 73 Ill. 506; The "Emily" *v.* Carney, 5 Kansas, 645; Frank *v.* Adams Express Co., 18 La. Ann. Rep. 279. The onus is on the carrier, Chicago, etc., R. R. Co. *v.* Moss, 60 Miss. 1003; Singleton *v.* Hilliard, 1 Strobt. (S. C.) 203; Erie R. R. Co. *v.* Lockwood, 28 O. St. 350.

not in any legal sense the servant of the defendant, but in the Supreme Court of the United States this decision was reversed and the doctrine, as stated above, announced.[1]

Where the fire is the work of a mob of strikers, formerly the employés of the company, the fact that the loss was actually due to the acts of the defendant's servants must be shown.[2] It does not appear to be enough to show simply that the riot was begun in a strike of the defendant's employés and that the fire was the work of the rioters.

§ 230. The exception "fire" in a bill of lading is to be strictly interpreted. Where goods were sent by a carrier over a line necessitating carriage both by rail and by water and the bill of lading, excepted "dangers of navigation, fire, and collision on the lakes and river and on the Welland Canal," it was held that the limitation did not extend to a loss by fire on the railroad.[3] The exception does not entitle the carrier to freight on the goods destroyed, but simply protects him from liability for their loss.[4]

§ 231. The exception, however, is co-extensive with the liability. It is co-extensive in point of time. The master of a vessel transporting goods under a bill exempting him from liability for loss by fire and landing them at port of discharge is, so long as the goods remain in his custody after being landed, protected by the exception in his bill.[5] The carrier, to claim the benefit of the exception, must have fulfilled his part of the agreement. An infringement of the Sunday law of the State by the carrier, followed by loss by fire, will not render the carrier liable when protected by the exception.[6] Where the carrier stipulates in the bill of lading that he will carry the goods to their destination without transfer, in cars owned and controlled by himself and he fails to do so, he cannot avail himself of the restriction of his common law liability.[7]

[1] 1 Flippin, 242. In Supreme Court, 93 U. S. 174.

[2] Wertheimer *v.* Penna. R. R. Co., 17 Blatchf. 421.

[3] Barter *v.* Wheeler, 49 N. H. 9.

[4] New York Central & H. R. R. R. Co., 20 Hun (N. Y.), 39.

[5] Hong Kong, etc., Corp. *v.* Bake, 7 Bom. H. C. Rep. 207.

[6] Wilde *v.* Merchants' Dispatch Trans. Co., 47 Ia. 272.

[7] Stewart *v.* Merchants' Trans. Co., 47 Ia. 229; Robinson *v.* Merchants' Trans. Co., 45 ib. 470.

§ 232. In England, the Merchant Shipping Act of 1854,[1] provides, *inter alia*, "that no owner of any sea-going ship, or share therein, shall be liable to make good any loss or damage that may happen without his actual fault or privity of, or to any of the following things (that is to say): 1. Of or to any goods, merchandise, or other things whatsoever taken in or put on board any such ship, by reason of any fire happening on board said ship."

The Act of Congress of March 3, 1851,[2] substantially follows the British statute: "No owner of any vessel shall be liable to answer for or make good to any person any loss or damage which may happen to any merchandise which shall be shipped, taken in or put on board any such vessel, by reason of or by means of any fire happening to or on board the vessel, unless such fire is caused by the design or neglect of such owner."

The effect of these acts certainly is (within those cases to which they apply) to superadd to the exceptions existing at common law, the exception contained in the statute and as a contract is supposed to be made with a view to the general law relative to the subject-matter, such an exception is to be regarded as written into all contracts to carry to which the statutes apply.[3]

The master of the vessel is not protected by the provisions of these acts, so it would seem that he is excluded from the benefit of the limitation unless fire be specially named among the exceptions of the bill of lading.[4]

It has been decided that the American act, although it excepts inland navigation, nevertheless applies to commerce between the States;[5] that navigation on the great lakes is within the contemplation of the statute and hence, that where goods

[1] 17 and 18 Viet. c. 104, § 503, reenacting 26 G. III., c. 86, § 2.

[2] C. 43, § 1, v. 9 (p. 635); Rev. Stat. U. S., p. 827, § 4282.

[3] Torrance *v.* Smith, 3 Upper Canada C. P. 411. Where goods were destroyed by fire while on board a lighter belonging to the owners of the ship, for the purpose of being conveyed from the shore to the ship, the owners were held responsible, as at common law, the case not being within the meaning of the statute. Morewood *v.* Pollock, 1 E. & B. 743; 22 L. J. Q. B. 250.

[4] Abbot on Shipping (7th American Ed.), * page 389.

[5] Headrick *v.* V. & T. A. L. R. R. Co., 48 Ga. 545.

were destroyed by fire upon the steamboat of a defendant in the harbor of Buffalo (without negligence on the part of the carrier) he cannot be held liable.[1]

Do these statutes affect the liability for a loss by negligence? The possibility of such a construction of the act of 17th and 18th Vict. does not seem, in England, to have been mooted. The American act is somewhat different. It will be seen that loss by fire caused by "design or neglect" of the owner is expressly taken out of the operation of the act, impliedly, it would seem, relieving the owner from all responsibility for the acts of any parties. Following this view, the Supreme Court in Walker *v.* The Transportation Company,[2] have held that the act relieves owners from responsibility for the negligence of their officers and agents in which they have not directly participated and HOFFMAN, Cir. J., has decided in Keene *v.* Whistler,[3] that the act relieves part owners from the effect of the negligence of a master.

§ 233. The third section of the act of 1851, has been decided in Providence, etc., Steamship Co. *v.* Hill Manufacturing Co.,[4] likewise to apply to loss by fire. This section provides that the amount to be recovered from any owner or owners for "any embezzlement, loss or destruction . . . . occasioned or incurred without the privity or knowledge of such owner or owners shall in no case exceed the amount or value of the interest of such owner or owners, respectively, in such ship or vessel and her freight then pending."[5] Mr. Justice BRADLEY in delivering the opinion of the court, held that the first and third section of the act were not repugnant, that both might apply to loss by fire and that the "privity or knowledge of the owners" mentioned in the third section is not necessarily the same as the "design or neglect of the owners" of the first section. "They (the owners) may not be able under the first section to show that it (the loss) happened without any neglect on their part or what a jury may hold to be neglect, whilst they may be very confident of showing under the third section that

[1] American Transportation Co. *v.* Moore, 5 Mich. 368.
[2] 3 Wall. 150.
[3] 2 Sawyer, 348.
[4] 109 U. S. 578.
[5] 9 Stat. 635.

it happened without their privity or knowledge. The conditions of proof in order to avoid a total or a partial liability under the respective sections are very different. It is true the owners of a ship may desire to contest all liability whatever, as well as to establish a limited liability if they fail in the first defence and this they may do as well in cases of loss by fire as in other cases in one and the same proceeding."[1]

[1] A dissenting opinion was filed by Mr. Justice Field, Gray, J., concurring. The provisions of the act may be taken advantage of by aliens, The "Scotland," 105 U. S. 24.

CHAPTER XVI.

EXCEPTIONS CONTINUED — FREEZING — FROM WHATEVER CAUSE — HEAT — SUFFOCATION — FERMENTATION — INJURIOUS EFFECT OF OTHER GOODS — DANGEROUS GOODS — INSUFFICIENT STOWAGE — JETTISON.

"Freezing," § 234.
Freezing after delay, § 235.
Freezing after delay by preceding carrier, §§ 236, 237.
"From whatever cause," § 238.
"Goods carried on deck at shipper's risk," § 239.
"Heat"—"Suffocation"—"Fermentation," §§ 240, 241.
Heat, etc., the result of defective stowage, § 242.
"Injurious effect of other goods"—"Dangerous goods"—"Insufficient stowage," § 243.
Liability under the clause "where ship is under charter party," § 244.
Illustrations of principles of the text, §§ 245, 246.
"Jettison"—definition, § 247.
Jettison—effect of negligence, § 248.
Liability for deck load, §§ 249, 250.

§ 234. THE addition of the exception, "freezing," relieves the carrier from losses occurring except through his own negligence or negligent delay. Thus, where a bill of lading provided that "the company would not hold itself liable at all for injury to any article of freight during the course of transportation occasioned by the weather," and in addition the words "general release" were written upon it, the import of which was explained to be that the carrier was released from all loss and damage happening to the shipment, and where it appeared from the evidence that though the goods were delicate fruits, and were to be carried for a long distance in the dead of winter, they were nevertheless stowed by the carrier in an ordinary box-car into which the cold and snow entered, and when it was shown that fruits packed in this manner would freeze in ordinary winter weather; it was held that the carrier's liability was not discharged by the bill of lading.[1] The pecu-

[1] Merchants' Dispatch and Trans. Co. *v.* Comforth, 3 Col. 280.

liarity of the New York law which permits even negligence to be excepted is seen in a case in which the exact reverse of this doctrine is authoritatively stated.

In Nicholas *v.* New York Central, etc., R. R. Co.,[1] the contract contained a release from liability for "damage to perishable property of all kinds occasioned by delays from any cause or change of weather . . . . heat or cold," and the carrier was held not to be liable for the freezing of the goods (fruit trees), though it occurred through his own negligence, since the release contemplated a complete exemption and the law permitted it. The general rule, however, is that the freezing of perishable articles is not, when it might have been prevented by the exercise of due diligence and care on his part, such an intervention of *vis major* as excuses the carrier.[2] Here, too, as has been noted with respect to other exceptions, the question of what will amount to such negligence as should take the case out of the exception is to be determined according to the circumstances of each case. Where potatoes were being transferred across the North River by a carrier in unusually severe weather, stowed on deck as was usual, and were frozen, it was held that it was no defence that such stowage would ordinarily have been sufficient protection, or that it would have cost defendants more money to have put them below deck. "The intensity of the cold," it was said, "created also the obligation of additional vigilance and what was usual was not the consideration. What was necessary was the true criterion."[3]

§ 235. The carrier is liable for the value of goods frozen after negligent delay. So where the bill of lading read "not accountable for freezing," and "to be delivered without delay," and the goods were delayed and frozen, the carrier was held liable.[4]

The delay must, however, be unreasonable and unnecessary. The circumstances of the case and the average period of

[1] 4 Hun, 327.

[2] Wolf *v.* American Express Co., 43 Mo. 421; Read *v.* St. Louis, Kansas City, etc., R. R. Co., 60 Mo. 199.

[3] Wing *v.* New York and Erie R. R. Co., 1 Hilton, N. Y. 235; see Vail *v.* Pacific R. R. Co., 63 Mo. 230.

[4] Whicher *v.* Steamboat Ewing, 21 Iowa, 240; Pittsburgh, Ft. W. & C. R. R. Co. *v.* Hazen, 84 Ill. 36; Armentrout *v.* St. L., K. C. & N. R. R. Co., 1 Mo. App. 158.

transportation at the time in question, are to be considered. Thus, where apples were shipped from Vandalia to Minneapolis by way of Chicago and were seven days in reaching the latter place, the defendant showed that at the time of the shipment its tracks and depot at Chicago had just been destroyed by the great fire; that the company was giving preference to relief goods which they were carrying to sufferers from the fire at Chicago and that the average time for the carriage of other goods at this time was about ten days. It was held that this was not such a delay as would render the carrier liable for the freezing of the goods.[1]

§ 236. An interesting question arises when the negligent delay has occurred on the route of one of two or more connecting carriers, but the loss of goods by freezing takes place when the goods are in the hands of a subsequent carrier. Clearly the later carrier, if free from blame, cannot be held liable, but can the prior carrier? This was the question which was discussed in Michigan Central R. R. Co. *v.* Curtis.[2] Here it is decided affirmatively: "They did not have the right," say the court, referring to the carriers, "to delay unreasonably the delivery of the trees until they would inevitably be destroyed in the hands of the next carrier and then be heard to say that they were destroyed in the hands of the company into whose hands they passed them for ultimate delivery. If they were guilty of such negligence they thus rendered themselves liable, no matter in whose hands the trees were overtaken and destroyed by the frost, if the injury was the natural and proximate result of their acts."

§ 237. A somewhat different construction of the law was at almost the same time given in the neighboring State of Michigan.[3] Here it was insisted upon by the court that a direct connection between the delay and the subsequent freezing must be shown to render the negligent carrier liable. The reasoning of the court is worthy of consideration. "The only breach of

[1] Michigan Central R. R. Co. *v.* Burrows, 33 Mich. 6; Burroughs *v.* Grand Trunk R. Co., 34 N. W. Rep. 875.

[2] 80 Ill. 324.

[3] Michigan Central R. R. Co. *v.* Burrows, 33 Mich. 6.

this agreement complained of was the failure to deliver within a reasonable time. Are then the damages claimed the natural and proximate consequences of such breach? We think not. To be so, the loss must be immediately connected with the supposed cause of it. The loss in this case might or might not have occurred, even had there been no delay. If, in the ordinary course of events, a certain result usually follows from a given cause, then we may well consider the immediate relation of the one to the other established. Cold, freezing weather does not, however, in the ordinary course of events follow from mere delay. Such is not the natural and direct result of delay. It is true that in certain climates and at certain seasons such an injury would be much more likely to result from delay, while at others there would be not even a possibility of such a result following. It is very evident, therefore, that as we approach the one or the other, we enter upon debatable ground, where it would be very difficult, if not, indeed, impossible to say what the result of a given delay would be. Where fruit is to be carried a long distance, especially in such a country as this, where the climate is so changeable, it would as frequently result that delay would be the cause of averting such injury as of contributing to it. It may be true, that had there been no delay whatever on the part of the defendant, the loss would not have occurred. The law, however, cannot enter upon an examination or inquiry into all the concurring circumstances which may have assisted in producing the injury and without which it would not have occurred. To do so would not only be to involve the whole matter in utter uncertainty, for when once we leave the direct and go to seeking after remote causes, we have entered upon an unending sea of uncertainty and any conclusion which should be reached would depend more upon conjecture than upon facts."

§ 238. The expression "From whatever cause," was defined by Mr. Justice HOGEBOOM, in Smith *v.* New York Central Railroad Company,[1] in respect to the carriage of a person in charge of live-stock upon a stock-pass containing this phrase, in the following language:—

[1] 29 Barb. (N. Y.) 132. Affirmed 24 N. Y. 222.

"There are risks incident to the transaction to which this clause might naturally and properly apply; risks from the stock themselves; risks from detentions along the way; risks from the necessity of moving about the cars for the purpose of feeding and taking care of the stock; risks from the increased difficulties and perils of operating a train of cars heavily encumbered with live stock; risks incident to the management of every railroad train, and inherent in the very nature of the business, and not always possible to be avoided, even by the exercise of the utmost precaution. Against such risks we may well conclude the parties intended to contract; but to assume that the passenger intended to issue a license for misconduct, or pay a premium for negligence, is more than I am willing to believe."

The effect of this phrase seems, therefore, but little different from that of the other general expressions of release elsewhere considered, as "owners' risk," "general release," "unavoidable accident," etc. It will not exempt from the consequences of negligence. In Oxley *v.* St. Louis, etc., Railroad Company[1] the bill of lading for the shipment of twenty-one mules and one horse, stipulated that the carrier should not be liable for loss by escape or "from any cause whatsoever." The car door was not fastened by the carrier's agent, as the shipper requested, and one mule escaped. The carrier was held to be liable for the escape, since his negligence had caused or had co-operated in causing it. In Hawkins *v.* Great Western Railroad Company,[2] the exceptions included "all risks of loss, injury, damage, and other contingencies in loading, unloading, conveyance, and otherwise," but these, it was said, did not include an injury caused by the bottom of the car in which the animals were dropping out, and the carrier was held liable. In Louisville, etc., R. Co. *v.* Oden,[3] a stipulation in a bill of lading exempting the company from loss or damage "by fire or other casualty," was held to be good, except as against losses from the negligence of the company's agents or servants.

§ 239. The presumption in every contract for carriage by water, is that the goods shall be stowed below decks. Said

[1] 65 Mo. 629; S. & N. A. R. R. Co. *v.* Henlein, 56 Ala. 368. But see Ill. Cent. R. R. Co. *v.* Hall, 58 Ill. 409.

[2] 17 Mich. 57.

[3] 80 Ala. 38.

Mr. Justice SHIPMAN in the Circuit Court of the United States for the Eastern District of New York, "The duty to store under deck is deemed a condition of every bill of lading, whether expressed or not; unless the liability is expressly excluded by the terms of the contract, it will always be deemed one of its provisions. This is a general rule of maritime law arising out of the general usage of the commercial world."[1] Deck stowage is therefore *prima facie* negligence on the part of the carrier unless authorized by the bill of lading.[2] It is, hence, not unusual to insert some such provision as the expression under consideration with the terms of the contract where the circumstances of the case make deck-stowage a necessity, for the purpose of giving the carrier authority to make such stowage and of placing the liability for the increased risk upon the shipper. The subject will be discussed at some length in connection with the exception, jettison.

The question, what is deck-stowage? is thus answered in Lowndes on General Average.[3] "Whether a ship's poop or a house built on deck is to be considered as a proper place for cargo so as to entitle goods carried there to the privileges of under deck cargo in the matter of jettison, is a question which has given rise to much doubt. The practice is to treat the poop as under deck, and to follow the same rule with such houses as are permanently built into the ship either by forming part of its frame or by being let down into the beams and solidly secured with iron keys or in some equally substantial fashion. Cargo in mere temporary erections not so secured is treated as if on deck." In The Neptune,[4] the case in which the stringent rule respecting stowage below deck above quoted was pronounced by Mr. Justice SHIPMAN, it was held that when on the short voyage from Boston to New York, goods were stowed on the main deck of a steamship which was bulwarked entirely round and under cover of the upper deck, and were well stowed except they were not stanchioned down from the top and that

[1] The Neptune, 16 L. T. Adm. 36.

[2] The Peytona, 2 Curtis, 21; The Delaware, 14 Wall. 579; Barber *v.* Brace, 3 Conn. 9.

[3] P. 48.

[4] 16 L. T. Adm. 36.

no bulkheads were built behind them, these goods were stowed in sufficient compliance with the rule as laid down by the court.

A custom of the trade may be introduced to prove the right to deck stowage, but it may be modified by a custom not to pay for it if jettisoned.[1]

In the first case of Gould *v.* Oliver,[2] in 1837, the plea on behalf of the owner of the vessel against a claim for general average was that there was not and never had been a custom for the ship-owners to make contribution by way of general average towards the jettison of a deck-load of timber. This was held to be bad; but on the same facts coming before the court, in a second case of the same name in 1840, evidence was introduced to show that it was not only customary to carry timber on deck but also customary for such loads to be at the risk of the ship-owner, and inasmuch as the shipper had not consented to that method of stowage, the carrier was liable.[3] This decision led to the practice of inserting in the contract for carriage a provision permitting deck stowage, and then in event of jettison being necessary, a "general contribution" in the nature of a general average between the owners of the ship and of the owners of the timber jettisoned (but not affecting other shippers) was held enforceable.[4] This doctrine, the learned author above quoted says, obtains with respect to deck shipments of wooden goods, tar, and perhaps resin.[5]

The effect of provisions in the bill of lading restricting liability upon this practice is of interest. Where, for example, the bill of lading or charter-party provides that the deck stowage is to be "at the ship's risk," the same author holds that the right of compelling contribution from the owners of the deck cargo is clearly excluded, but that where such phrase is not

[1] Gould *v.* Oliver, 4 Bing. N. C. 134; Same *v.* Same, 2 M. & G. 208; Miller *v.* Tetherington, 6 H. & N. 278; S. C. 30 L. J. Ex. 217. Affirmed 7 H. & N. 954. Cory *v.* Robinson cited Lowndes on General Average, p. 42; Mellor *v.* Chapple, same.

[2] 4 Bing. N. C. 134.

[3] Gould *v.* Oliver, 2 M. & G. 258.

[4] Johnson *v.* Chapman, 19 C. B. N. S. 563; 35 L. J. C. P. 23.

[5] Lowndes on General Average, p. 44, 45.

used the better opinion would seem to be that the owner of the goods is liable for his share.[1] From these analogies it would seem, where the clause "at shipper's risk" is used in this connection, that even in the case of timber or other goods customarily carried on deck, the carrier who has not been guilty of negligence is wholly exempt from the responsibility for loss.

§ 240. In Cragin *v.* New York Central Railroad Company,[2] under the terms of the bill of lading the shipper had assumed all risks of injuries from "heat, suffocation, etc." The shipment was a car-load of hogs. The hogs died from the effects of the heat and from the neglect of the carrier's servants to water and cool them. It was held that the stipulation of the bill of lading exempted even from a responsibility for the results of negligence; for, said EARL, C., "if it be held that this stipulation simply exempts the defendant from liability for injuries to the hogs from heat without any fault on its part, then it gets nothing, for in such case without the stipulation it would not be responsible."

Whether this is a true exposition of the law in New York may be questioned.[3] It certainly is not the law elsewhere. In Illinois, etc., Railroad Company *v.* Adams[4] hogs were transported by a railroad under contract that they were "to be fed and taken care of by owner." The conductor of the train neglected to cause water to be poured over the hogs when they became overheated (which, it was shown, is usually done in such cases by placing the car under the spout of one of the railroad's watering tanks) and many of them perished. The carrier was held liable.

This agrees with the law as set forth in a Missouri case. Where the bill of lading excepted loss by "suffocation," it was held that if the suffocation resulted from the negligence of the carrier, the owner was entitled to recover for the loss.[5] So in Leniv *v.* Dudgeon,[6] where a ship with cattle on board came out

[1] Lowndes on General Average, p. 47.

[2] 51 N. Y. 61.

[3] Cragin *v.* R. R. Co. is followed and indorsed in Nichols *v.* R. R. Co., 4 Hun (N. Y.), 327.

[4] 42 Ill. 474.

[5] Sturgeon *v.* St. Louis, etc., R. R. Co., 65 Mo. 569.

[6] L. R. 3 C. P. 17, n.

of the Maese River to sea with insufficient ballast, in consequence of which she was thrown on her beam ends by a ground swell and most of the cattle were thrown overboard or suffocated. This being a case of culpable negligence, the exception "suffocation" in the bill of lading was of no effect.

§ 241. The exception "heat" is frequently employed with respect to the injury to merchandise by warm weather or by fermentation. Here, too, the liability of the carrier depends upon the question of the existence of negligence.[1]

"It has been established in the superior courts of law," says a learned writer, "that a ship-owner is not liable for the heating of grain nor for damage arising from decay or depreciation from natural causes."[2]

In Warden *v.* Greer[3] the action was brought against the owners of a steamboat on account of the loss on a cargo of two hundred barrels of molasses, stated in the bill of lading to have been received in good order and well conditioned. Upon the delivery at Pittsburgh two of the barrels were missing, seven were empty or nearly so and others were only half full. The evidence showed that it was the nature of molasses to ferment and expand in handling in hot weather and to vary greatly in bulk from time to time. It further appeared that the article loses inevitably by leakage in transportation. It was conceded that the two barrels lost must be paid for, but the court held that the loss due to leakage or contraction was unavoidable and that the carrier could not be held to answer for it.[4]

§ 242. Where the heat or fermentation is the result of defective stowage the carrier is liable, as in the Nepoter,[5] where

[1] Mendelsohn *v.* The Louisiana, 3 Woods, 46; Beard *v.* Ill. Cent. R. Co., 44 N. W. (Iowa), 800.

[2] Leggett on Bills of Lading, citing The Anna Maria, Adm. Ct., 31 July, 1871.

[3] 6 Watts (Pa.), 424.

[4] "So where a cargo of wheat, on its arrival at Dublin on a voyage from Caen, was found to be heated and after delivery the merchant issued an admiralty writ for damage to the cargo, not alleging anything against the ship but against the inexpertness of the master in not detecting the condition of the cargo when shipped. The clause 'dangers and accidents of the seas' was inadvertently omitted from the bill of lading, but at the hearing the court dismissed the petition." Leggett on Bills of Lading, p. 135.

[5] 38 L. J., Adm. 63.

sugar became heated and was much damaged through the lack of necessary drainage, or in the Freedom,[1] where oil cake was caused to heat by being covered by a quantity of bones stowed in bulk. In the Alexandra,[2] however, on an allegation that the damage to the cargo originated from defective stowage and heat and fermentation arising from the cargo being stowed in too close conjunction with other cargo, it was held that the plaintiffs must establish affirmatively that the cargo on its arrival at its port of destination was in a damaged condition, and that the onus then falls on the ship to prove that the original stowage was good, and that the perils of the sea subsequently occurring, created the damage.[3]

§ 243. The rule respecting the carrier's liability for a careful and prudent stowage of the goods shipped is rigid. No phrase or exception of the bill of lading can exonerate from responsibility for the results of a negligent or faulty stowage.[4] If the goods arrive in port in a damaged state, it has been said that it is for the carrier to show that the stowage was good,[5] and certain it is that wilful and personal neglect need not be shown to charge the carrier. The mere fact that the loss resulted from the character of the stowage will be sufficient to make a *prima facie* case against him.[6] It follows as a corollary from these principles that the carrier must so stow and arrange different articles of cargo that they may not injure each other and that failing to do so he will be liable to the shipper for the damage done to the goods by the injurious effects of other goods, even without the allegation or proof by the owner of any wilful or negligent default on his part.[7]

[1] L. R., 3 C. P. 594.

[2] 14 L. T. 742.

[3] Where cargo belongs entirely to one shipper it may be assumed that he knows the effect of one sort of goods upon another. Ohrloff *v.* Briscall, L. R., 1 C. P. 231; S. C., 35 L. J., C. P. 63.

[4] The Star of Hope, 17 Wall. 651; Baxter *v.* Leland, 1 Abb. Adm. 348; Dedekam *v.* Vose, 3 Blatchf. 44.

[5] The Alexandra, 14 W. R. 466; 14 L. T., N. S. 742.

[6] Brass *v.* Maitland, 6 El. & Bl. 470; Swainston *v.* Garrick, 2 L. J. Ex. 255; Hayn *v.* Culleford, 48 L. J., Q. B. 372; Gillespie *v.* Thompson, 2 Jur. N. S. 713 n.; S. C., 6 El. & B. 477 n.; 36 Eng. L. & Eq. 227; Hills *v.* Mackill, 36 Fed. Rep. 702.

[7] Sack *v.* Ford, 13 C. B. N. S. 90; Blackie *v.* Stembridge, 6 C. B. N. S.

Where, however, the responsibility for the stowage rests with the plaintiff, it is obvious that the carrier is not liable for the injurious results, if it be faulty. This may arise where the contract expressly or impliedly provides that the shipper shall see to the stowage,[1] or where the shipper voluntarily assumes that duty, as by sending stevedores to do the work,[2] by saying that some one will come and superintend the stowing,[3] or by personally superintending the work, the owner being ignorant of the character of the goods,[4] or where he assents to the manner of stowage followed by the ship owner,[5] or where the stowage is in accordance with an established usage, if the carrier be not otherwise in fault.[6]

§ 244. If, however, the ship be chartered by third parties, the owners, by their servants, the master and crew remaining in possession, and the vessel be then offered for general freight without notice of the pre-existing charter party being given to the shippers, the owners will be responsible to a shipper who is ignorant of the charter party, for improper stowage, although the goods were stowed by a stevedore appointed by the charterers.[7] So also the carrier will be liable if the goods in suit have been stowed in the usual way, but near goods, which were in bad condition when put on board, although but for their condition they would not be injurious.[8] Where the fault was that of a third person, as of the shipper of the injurious goods,

894; Alston *v.* Herring, 11 Exch. 822; Gillespie *v.* Thompson, 6 El. & Bl. 477 n.; The Bark Colonel Ledyard, 1 Sprague, 530; Bearse *v.* Ropes, Id. 331; Mackinnon *v.* Taylor, Com. Ca. 514; Brusseau *v.* The Hudson, 11 La. Ann. Rep. 427; Rocherou *v.* The Bark Hausa, 14 La. Ann. Rep. 431; Cranwell *v.* The Fanny Fosdick, 15 La. Ann. Rep. 436.

[1] Angell on Carriers, § 212; Fletcher *v.* Gillespie, 3 Bing. 635.

[2] Murray *v.* Currie, L. R. 6, C. P. 24.

[3] Swanston *v.* Garrick, 2 L. J. N. S. Exch. 255.

[4] Ohrloff *v.* Briscall, L. R., 1 C. P. 231.

[5] Hovill *v.* Stephenson, 4 Car. & P. 469; Mayor *v.* White, 7 Car. & P. 41.

[6] Clark *v.* Barnwell, 12 How. 272. The shipper is said to be chargeable with notice of such usage. Baxter *v.* Leland, 1 Blatchf. 526. But see The Filia Maggiore, 2 L. R. Adm. 106.

[7] Sandeman *v.* Scurr, *supra*. The St. Cloud, Brow & L. Adm. 4, cited Angell on Carriers, § 212 n.; The Filia Maggiore, 2 L. R. Adm. 106.

[8] The Bark Cheshire, 2 Sprague, 28.

and even when no fault is properly chargeable to any one, the carrier is, nevertheless, bound to answer for the consequences of defective stowage, though a remedy will lie in favor of the carrier over against the shipper of the offending article.[1]

§ 245. A few cases will serve to illustrate the foregoing principles.

In Allston *v.* Herring[2] the plaintiff chartered the defendant's vessel for a voyage from Glasgow to Colombo. The plaintiff sent on board the vessel cambric goods and then agreed with a third party to carry goods for them for freight. This party shipped a quantity of sulphuric acid, which was stowed by the defendant near the plaintiff's goods. The master signed and delivered to the plaintiff bills of lading for both the cambric and the acid. No notice was given to defendant that the cargo contained sulphuric acid. In the course of the voyage the acid leaked and damaged the plaintiff's goods. In an action by the plaintiff on the bill of lading for not delivering the goods in good condition, it was held that the neglect of the plaintiff to give notice of the shipment of the sulphuric acid was no excuse for the defendant's breach of contract, since it was only a remote cause of the damage, the proximate cause being the act of the defendant in placing the acid where it was.

The stowage of iron bars in close proximity to copperas, by which they became encrusted with the sulphate of iron, is such negligent stowage as will bind the carrier, but it has been said that the stowage of iron and salt in the same cargo is not necessarily negligent.[3] The stowage of salt and dry goods together and of corn and merchandise on top of hogsheads of sugar have been justified as customs of the trade.

§ 246. In the Filia Maggiore[4] barrels of oil-cake had been stowed alongside of hogsheads of tobacco, oaken staves being placed between, and were damaged. Evidence to show that this was customary stowage was offered, but Sir Robert Phillimore, giving judgment for plaintiff, said: "The answer to this is twofold. In the first place, the plaintiff, Simmonds, says that this

[1] Alston *v.* Herring, 11 Exch. 822; The Bark Colonel Ledyard, 1 Sprague, 530; and cases cited above.

[2] 11 Exch. 822.

[3] See section on "Rust."

[4] 2 L. R. Adm. 106.

is a practice which his firm have always protested against and in the second place, it is a practice which the ship-owner adopts *suo periculo*. He cannot, by the adoption of it, get rid of his obligation to carry the goods of a shipper in proper condition. It may be that in certain circumstances and in a vessel of a certain size, tobacco and oil-cake may be stowed together without injury, but in a case where injury to a very considerable extent, as it is alleged in the present case, does arise from the joint stowage of these articles, it does not appear to me that the shipper can be deprived of his remedy against the ship-owner, on the ground that such stowage is usual and that in many cases, or usually, no injury accrues from it."

In Pierio *v.* Windsor,[1] mastic, an article new in commerce, was shipped by a plaintiff from New York to San Francisco as common freight, but was so affected by the voyage that it injured other parts of the cargo in contact with it and involved an increased expenditure in discharging. The injurious character of the article was unknown either to the shippers or to the defendants and no actual fault was implied. The master had paid for the damage done to the rest of the cargo. It was held that this, with all the damage and expense occasioned by the peculiar character of the article, must be borne by the shippers.

Where the goods shipped were of a dangerous character, the shipper was, at common law, bound to give notice of their nature to the carrier. Failing in this, he was held to be liable to the carrier for the damage caused by them.[2] The act of 36 and 37 Victoria[3] specifically prohibits the sending of dangerous goods (that is to say)—aquafortis, vitriol, naphtha, benzoin, gunpowder, lucifer matches, petroleum, or any other goods of a dangerous nature without giving notice of the nature of such goods and the address of the sender, an offence punishable by a fine not exceeding one hundred pounds. If such goods be sent under a false description of the goods, or a false descrip-

[1] 2 Clifford, 18.

[2] Hutchinson *v.* Guion, 5 C. B. N. S. 149; Farrant *v.* Barnes, 11 C. B. N. S. 553; Herne *v.* Garton, 2 E. & E. 66; Williams *v.* East India Company, 3 East, 192; Great Western Railway Co. *v.* Blower, L. R. 7 C. P. 655.

[3] 36 & 37 Vict., c. 85, §§ 23 to 28 incl.

tion of the sender, the penalty annexed is five hundred pounds. The master or owner of the vessel (British or foreign) may refuse to take on board any package or parcel which he suspects to contain such goods, and when such goods are discovered not marked as provided, or sent without notice, they may be thrown overboard by the master or owner without any liability, civil or criminal, being by him incurred. Such goods may moreover be declared by any court having admiralty jurisdiction to be forfeited and may be disposed of as the court directs.

The only provision similar to this to be found among the statutes of the United States is the act of 3 July, 1866,[1] relating to the carriage, packing, and marking of nitro-glycerine, in which the carriage of this commodity upon a vessel or vehicle used or employed in transporting passengers is altogether forbidden, and the method of packing and marking is prescribed, and a penalty of not less than one thousand dollars nor more than four thousand dollars affixed to the breach thereof. It has further been held that the shipper who delivers to the carrier a package containing such goods, but not properly marked, is liable to the carrier for all the damage caused by the explosion of the goods while in the carrier's custody.[2]

§ 247. The exception of goods lost by "jettison" is usually included in the bill. In the case of Bird *v.* Astcock,[3] Lord Coke decided that where goods were thrown overboard in a great storm by a bargeman to save the lives of the passengers by lightening the barge, the carrier was exonerated from liability; while in Bancroft's Case, cited by Lord Chief Justice Rolle, in Kenrig *v.* Eggleston,[4] it is stated that where a box of jewels having been delivered to a ferryman, who knew not what it contained, and upon a sudden storm arising in the

[1] R. S., §§ 5354, 5355, 4278, 4279.

[2] Boston, etc., R. R. Co., *v.* Shanley, 107 Mass. 568. But where nitro-glycerine was intrusted to the carrier without notice of its character, and exploded, injuring the building of a third person, it was held that the carrier could not be held liable, if he had handled the package in a way in which packages not calculated to arouse suspicion are ordinarily to be handled. The Nitro-Glycerine Case, 15 Wall. 524.

[3] 2 Bulst. 280.

[4] Aleyn, 93.

passage, he threw it into the sea, it was resolved that he should answer for it. Sir WILLIAM JONES conjectures that the real reason for the ruling in the latter case was the culpable negligence of the carrier in not preserving the goods intrusted to his care, so long as it was reasonably possible for him to do so. These two cases contain all the law as to the carrier's liability in case of jettison.

Jettison is defined as the heaving overboard of the goods in order to save the ship.[1] To this may be added the explanation of Chancellor KENT: The goods "must be intentionally sacrificed by the mind and agency of man for the safety of the ship and the residue of the cargo. The jettison must be made for sufficient cause and not from groundless timidity. It must be made when the ship is in danger of perishing by the fury of a storm or is laboring upon rocks or shallows or is closely pursued by pirates or enemies."[2]

It follows from these definitions that jettison may fall within the exceptions, "act of God," "perils of the sea," "the public enemy," and may probably be included in others of the excepted perils.

§ 248. The usual, implied provision with respect to negligence, however, obtains. Neither the exception, "perils of the sea," nor the exception "jettison" will exempt a carrier who has jettisoned the goods without sufficient reason, or has negligently placed himself in such a position that jettison is necessary, as by setting to sea in an unseaworthy vessel or by improper stowage.[3]

The circumstances of each case are to be inquired into. In Van Syckel *v.* The Thomas Ewing,[4] a vessel entering Mobile Bay, at dusk, with a strong wind blowing in shore, and every prospect of bad weather, endeavored, for want of a pilot (there being none at hand), to follow the course of a pilot-boat in advance of her, and ran aground on a bar of mud. The master,

[1] The Neptune, 16 L. T., N. S. Adm. 36.

[2] Kent's Comm., iii. p. 233.

[3] Nemours *v.* Vance, 19 How. 162; Laurence *v.* Minturn, 17 ib. 100; The Portsmouth, 9 Wall. 682. The principle is alike applicable to exceptions in bills of lading and in policies of insurance. The Portsmouth, *supra*, Ins. Co. *v.* Sherwood, 14 How. 365.

[4] 3 Clark (Pa.), U. S. C. C. 231; S. C. Crabbe, 405.

in order to lighten the load, broke open heavy casks of liquor carried on deck. It was urged that the carrier was guilty of negligence, first, in attempting to come up the bay without a pilot and, second, in breaking the casks of brandy instead of throwing them overboard and taking the chance of recovering some or all of them by their floating ashore. After considering the facts, the court held that such loss was within the meaning of the phrase, "peril of the sea."

§ 249. An interesting branch of inquiry under this question is, as to the rule of the carrier's liability for the loss of a deck-load. Clearly, where the bill of lading declares that the goods are to be stowed on deck, and at the same time excepts perils of the sea or jettison, the exception must be construed with reference to the particular adventure which the contract of affreightment shows was contemplated by the parties.[1]

The shipper in consenting to have his goods carried on deck has entered into the contract and taken the increased risk in consideration of a reduced rate of freight. The carrier cannot consequently be held to so strict a measure of liability.

As was said in The Milwaukee Belle,[2] the shippers have consented that the vessel should be by their own act rendered less manageable, and they cannot therefore sue for a loss consequent upon his own agreement on the ground that the stowage was improper.[3] Lawrence *v.* Minturn[4] was the case of a libel filed against the ship Hornet, for the non-delivery of two steam boilers, shipped on board that vessel in the port of New York. The boilers were, under the terms of the bill, to be stowed on deck, and were jettisoned in rough weather, without, as the court found, "any fault or breach of contract by the carrier." The shippers urged that the vessel with the boilers on deck was unseaworthy, but it appearing that the ship was new and that the goods were stowed according to the contract, the carrier was discharged.

[1] Lawrence *v.* Minturn, 17 How. 100.

[2] 2 Bissel, 197.

[3] Johnston *v.* Crane, 1 Kerr (New Brunswick), 365; Gould *v.* Oliver, 4 Bing. N. C. 134; Gould *v.* Oliver, 2 M. & G. 208; Smith *v.* Wright, 1 Caines, 43; Lenox *v.* Ins. Co. 3 Johns. Cas. 178.

[4] 17 How. 100.

§ 250. The presumption, however, is that goods are to be carried below deck and the burden of proving that the shipper agreed to deck stowage is on the carrier.[1] Even where the bill of lading is silent as to the place of stowage, the law implies that the goods are to be stowed below deck. Parol evidence of an agreement that they may be carried on deck is not admissible.[2] An established custom, as in the carrying of timber, may, however, be shown as entering into the contract.[3]

"If the goods are, without the consent of the merchant and contrary to established usage, stowed on deck and are, from being so placed, thrown overboard in tempestuous weather, the carrier will be answerable for the loss by the jettison."[4] So in an early Connecticut case[5] it was shown that gin was received as customary freight and was stowed on deck. The bill of lading excepted "dangers of the sea," and the goods were jettisoned. It was not pretended that the jettison was not necessary, but it was held that the carrier was liable unless he could show that such stowage was authorized by the consent of the shipper or by custom.

In the recent English case of Royal Exc. Ship Co. *v.* Dixon it appeared that a ship grounded and portions of the cargo were properly jettisoned, among which was cotton carried on deck, shipped under bills of lading containing exceptions of "jettison." The court held that the ship-owners were liable, as the exception referred only to goods stowed under deck, and that they were not excused by a custom in the trade of loading cotton on deck.[6] In the Enrique,[7] where the deck load consisted of cattle which were jettisoned in very rough weather, the bill of lading expressly excepted any loss that might arise through

[1] The Peytona, 2 Curtis, 21.

[2] The Delaware, 14 Wall. 579. Even where the bill specifies that certain of the goods may be carried on deck, parol evidence respecting the carriage of the others may not be introduced. Sayward *v.* Stevens, 3 Gray (Mass.), 97.

[3] Leggett on Bills of Lading, p. 200; Barber *v.* Brace, 3 Conn. 13; Gould *v.* Oliver, 4 Bing. N. C. 134; Same *v.* Same, 2 M. & G. 208; Da Costa *v.* Edmunds, 4 Camp. 142; Miller *v.* Tetherington, 30 L. J. Ex. 217; S. C. 3 L. T. 893; 6 H. & N. 278, affirmed 7 ib. 954, 31 L. J. Ex. 217.

[4] Angell on Carriers, § 218, n., and cases cited.

[5] Barber *v.* Brace, 3 Conn. 9.

[6] 12 App. Cases, 11.

[7] 5 Hughes, 275.

the cattle being washed overboard or jettisoned. It was urged that this exception was unreasonable and against public policy, but the court refused to so consider it.

In the case of necessary jettison, the shipper, though deprived of his remedy against the carrier by the exceptions of the bill of lading, has nevertheless a right to compel contribution from the owners of the ship and cargo under the principle of general average. General average, however, does not apply to the jettison of a deck load unless the other parties have assented to such stowage.[1] Where there has been no such assent and where the bill of lading contains such exceptions as those under consideration, the loss falls on the shipper alone.[2] So, too, where the jettison results from the *vice propre* of the goods jettisoned, as where hemp or cotton, shipped in a damp state and likely to catch fire from heating, is jettisoned, there is no general average and, it is safe to say, no liability on the part of the carrier under his contract.[3]

[1] Smith *v.* Wright, 1 Caines, 43; Lenox *v.* Ins. Co., 3 Johns. Cas. 178; Leggett on Bills of Lading, p. 200.

[2] Chappel *v.* Comfort, 31 L. J. C. P. 58.

[3] Johnson *v.* Chapman, 35 L. J. C. P. 23.

CHAPTER XVII.

EXCEPTIONS CONTINUED—LEAKAGE AND BREAKAGE—LACK OF FOOD—LOADING AND UNLOADING—OBLITERATION OF MARKS—OWNER'S RISK.

"Leakage and breakage," § 251.
Leakage and breakage—effect of negligence, § 252.
Leakage and breakage—burden of proof, § 253.
"Lack of food and water," § 254.
"Loading or unloading," § 255.
Loading or unloading—obligation to furnish suitable cars, § 256.
Rule in England, etc., § 257.
Construction in Michigan court, § 258.
"Obliteration of marks," § 259.
"Owner's risk," § 260.
Owner's risk—negligence, § 261.
Owner's risk—effect of fraud or misrepresentation, § 262.
Owner's risk in carriage of live stock, § 263.
Construction of exception by English courts, § 264.
Legislation in England, § 265.

§ 251. THE word "leakage," when used in a bill of lading, refers to loss by the leaking of the goods themselves and does not include damage done to other packages by a liquid escaping. So "breakage" does not cover the injury done to other goods by the cutting or rubbing of the broken article.[1] Where the accumulation of molasses drainage upon the floor of the hold of a vessel was so deep that certain casks of sugar were half submerged in it and were thereby caused to heat, it was held that this did not come within the exception "not liable for leakage."[2] So where one bale of piece-goods was damaged by oil having come in contact with it and others of the same shipment were injured by chafing during the voyage, it was held that the former damage did not come under the head of leakage nor the latter under breakage.[3]

[1] Thrift *v.* Youle, 46 L. J. C. P. 402.

In Hill *v.* Sturgeon, 28 Mo. 323, the bill of lading provided: "The . . . . owners insure the freight shipped on the barge against leaking and sinking." It was held that this was intended to insure only the seaworthiness of the barge.

[2] The Nepoter, 38 L. J. Adm. 63.

[3] Graham *v.* Hille, 10 Bom. H. C. Rep. 60.

Leakage or breakage, within the meaning of the exception, is not mere average leakage or breakage.[1]

In Ohrloff *v.* Briscall[2] nearly half of the oil which the bill of lading covered had leaked through the casks in which it was contained and had been lost. It was urged that this was too great a part of the entire quantity to be within the exception. The Court said: "We do not think such a construction allowable. The condition that the ship-owners are not to be accountable for leakage does not, in its ordinary and grammatical sense, put any limit to the quantity of leakage and on principle, therefore, we do not think it would be justifiable to add any such limit to its terms; nor are we aware of any authority for doing so."[3]

§ 252. The general rule may be thus stated: the exception includes all such leakage and breakage as reasonable care and diligence on the part of the carrier could not prevent. The carrier is liable for the result of his negligence.[4]

The question of negligence frequently resolves itself into a

[1] The Invincible, 1 Lowell Decisions, 225. In some cases, however, the bill of lading excepts "average leakage and breakage," and the burden then rests upon the claimants to show that the leakage is greater than the average. 630 Quarter Casks of Sherry Wine, 14 Blatch. C. C. 517; opinion by Waite, Ch. J., affirming 7 Ben. 506.

[2] 35 L. J. C. P. 63; S. C. The Helen, 15 W. R. 202, 12 Jur. (N. S.) 675; 4 Moore P. C. C. (N. S.) 70; B. & L. 429; 14 L. T. (N. S.) 873.

[3] The law in Louisiana seems to be otherwise, namely, that an exception such as "not responsible for leakage" excuses ordinary leakage merely but will not authorize the carrier to return empty casks. Brauer *v.* Barque "Almoner," 18 La. Ann. Rep. 266.

[4] Phillips *v.* Clark, 2 C. B. N. S. 156; S. C., 3 Jur. N. S. 467, 26 L. J. C. P. 168; Phillips *v.* Clark, 5 Jur. N. S. 1081; The "Oriflamme," 1 Sawyer, C. C. 176; The "David and Caroline," 5 Blatch. 266; Vitrified, etc., Sewer Pipes, 5 Ben. 402; Carey *v.* Atkins, 6 Ben. 562; Steele *v.* Townsend, 37 Ala. 247; Thompson *v.* C. & N. W. Ry. Co., 27 Ia. 561; Reno *v.* Hogan, 12 B. Monroe (Ky.), 63; Arend *v.* Liverpool, etc., S. S. Co., 64 Barb. (N. Y.) 118; S. C., 6 Lans. (N. Y.) 457; Mo. Valley R. R. Co. *v.* Caldwell, 8 Kan. 244; Baker *v.* Brinson, 9 Rich. (S. C.) 201; Hunnewill *v.* Taber, 2 Sprague, 1; The Jefferson, 31 Fed. Rep. 489; The Connaught, 32 Fed. Rep. 640; The Burgundia, 29 Fed. Rep. 607; Mark *v.* Surrey, 29 Fed. Rep. 608; The Polynesia, 30 Fed. Rep. 210; N. Y. Cent. *v.* Eby, 12 Atl. Rep. 482; West Manuf. Co. *v.* Guiding Star, 37 Fed. Rep. 641; The Barraconta, 40 Fed. Rep. 498.

consideration of the sufficiency of the stowage, and is to be determined by the circumstances of each case. It is, however, no defence to the presumption of negligence raised by proof of improper stowage, for the carrier to show that a professional stevedore was employed to stow the cargo;[1] but when by usage or agreement this business is performed by persons employed by the shipper, this fact will avail as a defence to the carrier.[2]

§ 253. The addition of the exception to the bill of lading does not free the carrier from the responsibility for loss through his own fault, but it does shift the burden of proof and make it necessary that the negligence shall be affirmatively shown before he can be held liable.[3] Thus, in Czech *v.* The General Steam Navigation Company,[4] the bill of lading excepted "breakage, leakage, or damage," and the goods were found at the end of the voyage to be injured by oil. It was shown that there was no oil in the cargo, but that there were two donkey engines on deck near the place where the goods were stowed, in lubricating which, oil was used. There was no direct evidence of how the injury occurred. It was held that whether these facts proved that the loss was due to the negligence of the carrier under these circumstances was for the jury. Even where the evidence shows negligent stowage the carrier will not be liable unless it appears that the damage resulted from that fact,[5] while on the other hand the proof of the existence of a defect in the goods themselves relieves the carrier, unless it can be shown that loss might have been avoided by the exercise of reasonable care.[6] In Nelson *v.* National Steamship Company[7] the bills of lading contained the exception "leakage, breakage, or stowage, however such damage may be caused," and likewise the written memorandum that the casks shipped thereby were loose. The consignees brought suit for loss occasioned by reason of injury to the casks through careless handling, but the court held that while the exceptions in

[1] Sandeman *v.* Scurr, 2 L. R. Q. B. 98; Rochereau *v.* Bark "Hausa," 14 La. Ann. Rep. 431.

[2] Thomas *v.* Ship "Morning Glory," 13 La. Ann. Rep. 269.

[3] The Steamship "Pereire," 8 Ben. 301; The Polynesia, 30 Fed. Rep. 210.

[4] L. R. 3 C. P. 14.

[5] The Delhi, 4 Ben. 345.

[6] The Bark "Olbers," 3 Ben. 148.

[7] 7 Ben. 340.

the bill of lading did not discharge the carrier's liability for his own negligence, yet it appearing from the evidence that some of the casks were loose at the time of shipment, the presumption was that this was the cause of the loss.[1]

In Louisiana it has been said that the proof of proper care in handling and stowing the goods must be made affirmatively by the carrier and the reason given is that "the proof of the character of the stowage is more within the power of the owners of the ship than the shipper."[2] Where leakage is caused by an attempt to abstract oil from the packages the carrier is liable, although the bill of lading exempts him from liability for "breakage and leakage."[3]

§ 254. The carrier of cattle, where the bill of lading does not expressly provide otherwise, is bound to feed, water and take proper care of the animals intrusted to him, and will be liable for a neglect to perform his duty in this regard.[4] So in a case where hogs had died for the want of water while in the hands of a railroad company, it was properly said that it was as much the duty of the company to provide water at suitable points on the line of the road for the use of the stock as it was to carry the animals.[5] In a Michigan case pigeons were being carried by an express company, there being much delay and the birds not being fed or watered, many of them died before delivery. There being nothing to indicate whether the carrier was acting as a common carrier or bailee for hire, it was left undecided whether an express company, acting in either capacity, "would, in the absence of an express agreement, be impliedly bound to supply them with food and water, so far as essential to their preservation."[6] By special stipulation in the bill of lading the carrier may be relieved in consideration of a

[1] In Walford's Summary of the Law of Railways, cited in Angell on Carriers, § 212, note 2, is to be found noted a series of cases in which the defect of the goods has been held not to operate as an excuse for the carrier. Zerega *v.* Poppe, 1 Abb. Adm. 397, goes some length in that direction.

[2] Tardos *v.* Ship "Toulon," 14 La. Ann. Rep. 429; Edwards *v.* Str. "Cohawba," ib. 224.

[3] Gigilo *v.* Britannia, 31 Fed. Rep. 432.

[4] Lawson on Contracts of Carriers, § 175.

[5] T. W. & N. Ry. Co. *v.* Hamilton, 76 Ill., 393.

[6] Am. Mer. Union Ex. Co. *v.* Philips, 29 Mich. 515.

reduced rate of freight, or other benefits, from the duty of feeding and watering the live stock and that duty be assumed by the shipper. In such case the carrier must, nevertheless, furnish adequate carriage, afford reasonable opportunities to the owner or his agents to care for the stock and subject them to no unnecessary delay in transportation. He will further be liable for the results of his own negligence.[1]

§ 255. The phrase "Load and unload at his own risk," or its equivalents, puts upon the shipper all risks of damage to the goods in loading them upon or unloading them from the vessel, car, carriage, stage, or other vehicle of transit. Manifestly, however, it has no application to damage to the goods while being transported,[2] nor to personal injuries to the shipper received in loading them.[3] In Stinson *v.* New York Central R. R. Company,[4] where the shipper was injured by a passing train while engaged in loading his goods, through the negligence and fault of the railroad company and the bill of lading contained the phrase under consideration, judgment was entered against the defendants.

§ 256. Even with the existence of this exception the carrier is obliged to furnish suitable and proper means of transportation. He will not be exempted from the responsibility for negligence in this regard. Where the carrier is exempted in the bill of lading from "all responsibility in loading or unloading or otherwise, whether arising from negligence, misconduct, or otherwise," he is liable for injuries caused by defects in the car. If the shipper did not assent to the use of the car in which his stock was shipped he was entitled, even in such a contract, to expect that they would be suitable for the business.[5] Hence, in a case which has twice been before the Supreme Court of Michigan, where, in loading, the bottom of the car

[1] South Alabama, etc., R. R. Co. *v.* Henlein, 52 Ala. 606; Illinois, etc., R. R. Co. *v.* Adams, 42 Ill. 474. But see Cragin *v.* R. R. Co., 51 N. Y. 61, contra.

[2] Indianapolis, etc., R. R. Co. *v.* Allen, 31 Ind. 394.

[3] Stinson *v.* N. Y. Central R. R. Co., 32 N. Y. 333.

[4] *Supra.*

[5] Hawkins *v.* G. W. R. R. Co., 17 Mich., 57; Potter *v.* Sharp, 24 Hun (N. Y.), 179; Shaw *v.* Y. N. M. R. Co., 13 Q. B. 347; 18 L. J. Q. B. 181.

furnished by the railroad company dropped out and the loss was due to this fact, the carrier was held liable.[1]

§ 257. In an English case, however, where the plaintiff's horses were injured in transit by defective trucks and the plaintiff had signed a "risk note," whereby loading and unloading were to be performed by the sender, and the company to be free from any risk in receiving, loading, forwarding, transit, or unloading, and from liability for suffocation, trampling, bruising, over-carriage, detention, delay; nor damages in relation to conveying or delivering said animals, however caused, nonsuit was entered for the defendants, and this the Queen's Bench refused to take off.[2]

In Penn *v.* Buffalo, etc., Railroad Company,[3] there was a special contract for the transportation of cattle at reduced rates, provided the shipper should load and unload at his own risk, the carrier furnishing necessary laborers to assist, under the direction and control of the shipper, who was to examine for himself all the means used. The train was delayed on the way and at a distance from the railroad's cattle-yard, on account of a snow-storm, and the plaintiff requested defendants to provide facilities and laborers for unloading. This they refused to do and the cattle were, in consequence of their long confinement, injured. It was held that the agreement intended that the carrier should furnish the facilities for and perform the labor of unloading, while the plaintiff should direct and control the laborers; that the cattle should have been unloaded during the delay; that it was not incumbent on the plaintiff to unload the cattle himself, upon defendant's default, though by procuring materials, etc., he might have prevented the damage; that the circumstance of a delay at a point where the carriers had no means of unloading, and they could not by reasonable diligence

[1] Hawkins *v.* G. W. R. R. Co., 17 Mich. 57; G. W. R. R. Co. *v.* Hawkins, 18 ib. 427.

[2] Gannell *v.* Ford, 5 L. T. N. S. 604. In Hood *v.* Grand Trunk Railway Co., 20 Upper Canada C. P. 361, the bill of lading for certain cattle provided that the shipper should undertake "all risk of loss, injury, damage, and other contingencies in loading, unloading, transportation, conveyance, and otherwise, no matter how caused." In the course of transportation a door of one of the cars became open, and the cattle fell out. The carrier was held not to be liable

[3] 3 Laws (N. Y.), 443.

obtain access for the train to their cattle-yard for unloading were not contemplated by the contract, and that the defendants were therefore liable.

§ 258. Quite as strict a construction of the phrase is that given in Sisson *v.* Cleveland, etc., Railroad Company.[1] Here, among the excepted causes of loss, were "all and every risk of injuries which the animals, or either of them, may receive in consequence of any of them being wild, unruly, ... escaping, maiming or killing themselves, or each other, or from delays, ... and risk of any loss or damage which may be sustained by reason of any delay, or from any other cause or thing in or incident to, or from and in the loading or unloading of the stock." It was held by the court, Mr. Justice COOLEY giving the opinion, that these expressions refer to loss or damage by reason of delay in loading or unloading only, and have no reference to other losses which the delays of the carrier in transit may cause the shippers.

§ 259. The carrier is not responsible for a misdelivery of goods consequent upon their being improperly marked.[2] "Goods ought to be plainly and legibly marked, so that the owner or consignee may be easily known and if, in consequence of omitting to do so, without any fault on the part of the carrier, the owner sustains a loss or any inconvenience, he must impute this to his own fault."[3]

Hence, in a Massachusetts case, where no bill of lading was given, and the address of the consignee was not indicated upon the goods, the shipper apparently relying upon the fact that previous goods similarly marked, but accompanied by bills of lading, had been properly delivered, it was held that this evidence would not justify a finding that the defendants' agent "ought to have clearly known" the destination of the goods, and that under the circumstances the defendants were not bound to deliver.[4] When a bill of lading properly describing the consignee has been signed the rule is otherwise. It would seem that the carrier is then bound to see that the goods are properly marked and to deliver them to the proper consignee.

[1] 14 Mich. 489.

[2] Angell on Carriers, § 136, and note.

[3] Ware, J., in the Huntress Daveis, 82.

[4] Fuin *v.* Western R. R. Co.

Where flour in sacks of different sizes, intended for two consignees, was sent on board a vessel without any mark distinguishing those intended for either consignee, and the master gave a bill of lading promising to deliver to one person a specific number of bags of a specified weight, it was held that he was bound to deliver the exact number of bags of such sizes as would come nearest to the specified weight;[1] and where a trunk had been properly delivered to the owner by the carrier, but was afterwards taken back and given to a third person who claimed it, it was said that it constituted no defence to the action brought by the owner that the trunk was not distinctly marked, although the carrier acted in good faith.[2]

The exception is, therefore, perhaps desirable in a bill of lading. A learned author on this subject cites a Bengal case, in which the similar phrase, "Not accountable for inaccuracies, obliteration, or absence of marks, address, description of goods shipped," is said to be designed to protect the ship-owner from liability for the misdelivery of the cargo if he can show that the absence or obliteration of the specific marks caused the landing at a port other than the port of destination; but that unless he can prove this, it will not be sufficient for him to show that the packages or cases did not bear, as alleged, on them the name of the port at which they were to be delivered.[3]

§ 260. Frequently the phrase "owner's risk," or sometimes simply the letters "O. R.," are written across or indorsed upon the bill of lading to further limit the carrier's liability.[4] This has been construed as meaning that the owner assumes all risks arising from the ordinary dangers of transportation by the means employed, which the reasonable and ordinary care of the common carrier might be insufficient to prevent.[5]

In Baltimore, etc., Railroad Co. *v.* Rathbone,[6] it is said that the words "owner's risk," taken in connection with the enume-

[1] Bradley *v.* Dumpace, 1 H. & C. 521.

[2] The Huntress Daveis, 82.

[3] Madhub Chunden Dey *v.* Law, 13 Ben. L. R. 394; Leggett on Bills of Lading, p. 255.

[4] The phrase "general release" is sometimes used in the same way.

[5] French *v.* Buffalo, etc., R. R. Co., 4 Keyes, 108; S. C. 2 Abb. App. Dec. 196; Hill *v.* Boston, etc., R. Co., 144 Mass. 284.

[6] 1 W. Va. 87.

ration of specific causes of loss in the bill of lading, are understood and intended by the parties to limit the carrier's liability to loss or damage such as might result from ordinary neglect,—that is, the want of that care and diligence which prudent men usually bestow to their own concerns.

Where the carrier has two rates at which he will transport the goods, and when the bill of lading, if the lower rate be paid, contains the words "owner's risk," and the term is therein explained as being intended to free the carrier from any loss except such as is occasioned by his own wilful misconduct, the carrier will not be liable for the damage to the goods occasioned by the improper packing of his servants.[1]

§ 261. The phrase does not include cases of loss occurring through the negligence of the carrier or his servants.[2] For example, it does not cover injury from delay caused by the carrier's neglect,[3] nor loss by improper stowage,[4] nor does it shield the carrier from liability when the goods have been stolen from him through the lack of due care.[5] A loss by embezzlement, it is said, is not within the exception, even where it has not been shown that the goods were embezzled by the master or crew, or by any other person, with their knowledge.[6]

[1] Lewis *v.* Great Western Ry. Co., 26 W. R. 255.

The clause in an advertisement of a stage line, stating route, fare, etc.: "All baggage at the risk of the owners" does not apply to parcels which do not belong to passengers. Dwight *v.* Brewster, 18 Mass. 50.

[2] Moore *v.* Evans, 14 Barb. (N. Y.) 524; Wells *v.* Stm. Nav. Co., 8 N. Y. 375; Alexander *v.* Greene, 7 Hill (N. Y.), 533; Sturgeon *v.* St. Louis, etc., R. R. Co., 65 Mo. 569; Wooden *v.* Austin, 51 Barb. 9; Cohen *v.* Southeastern Ry. Co., L. R., 2 Ex. D. 253; Westcott *v.* Fargo, 63 Barb. (N. Y.) 349; Nashville, etc., R. R. Co. *v.* Jackson, 6 Heisk. (Tenn.) 271; Ketchum *v.* American, etc., Express Co., 52 Mo. 390; Hurkley *v.* N. Y. C. & H. R. R. Co., 3 Thomp. & C. (N. Y.) 281; M. & O. R. R. Co. *v.* Jarboe, 41 Ala. 644; Illinois, etc., R. R. Co. *v.* Morrison, 19 Ill. 136; Wright *v.* Gaff, 6 Ind. 416; German *v.* Chicago, etc., R. R. Co., 38 Ia. 127; Wallace *v.* Sanders, 42 Ga. 486.

[3] D'Arc *v.* London, etc., Ry. Co., 9 L. R. C. P. 325.

[4] Thompson *v.* Chicago, etc., Ry. Co., 27 Ia. 561. But see Lewis *v.* Great Western Ry., 26 W. R. 255.

[5] Simon *v.* S. S. Fung Shuey, 21 La. Ann. Rep. 363.

[6] Schieffelin *v.* Harvey, 6 Johns. (N. Y.) 170; S. C., Anthon's N. P. 76.

The question of what is negligence is here as ever a question to be decided under the circumstances of each case.[1] Where the carrier accepts for transportation in the winter season, to ship half-way across the continent delicate fruits, the character of his employment clearly implies that he will ship them in such cars, and exercise such diligence as may be reasonably necessary for their safe passage to their destination. Having failed to do this, he cannot escape liability, although the bill of lading under which the shipment was made was endorsed "general release."[2]

Proof that the country was in a state of war; that the defendant's railroad was often used by the military authorities, and that there was great want of certainty and safety in the transportation of freight, is not such a *prima facie* showing of diligence as will exempt the carrier.[3] So also the fact that the plaintiff's goods were received under a contract that they were to remain in charge of a guard of troops, "the company accepting no responsibility," does not relieve the carrier from liability for a loss arising wholly from his own neglect.[4]

§ 262. Fraud or misrepresentation will avoid the effect of this exception and will restore the carrier to his full common-law liability. In Dauchy *v.* Silliman,[5] the carrier received rye of the plaintiff to be carried under a special agreement at the risk of the plaintiff, the plaintiff to have the cargo insured at the defendant's expense. Owing to the vessel being of a different class from that represented by the defendants, the insurance

[1] In certain cases it is said that notwithstanding the existence of the phrase we are considering in the bill of lading the carrier must make out a *prima facie* case that the loss was not caused by negligence, or in other words that the proof of non-delivery of the goods is all that is required to bind the carrier unless he can rebut this presumption by proof of care and diligence. This may be considered as an extreme application of the policy of the law of some States of throwing the burden of proof of diligence upon the carrier, and is certainly not the law in such States as do not hold to this doctrine. Ketchum *v.* American, etc., Express Co., 52 Mo. 390; Mobile, etc., R. R. Co. *v.* Jarboe, 41 Ala. 644.

[2] Merchants', etc., Trans. Co. *v.* Cornforth, 3 Col. 280.

[3] Mobile, etc., R. R. Co. *v.* Jarboe, 41 Ala. 644.

[4] Martin *v.* Great Indian, etc., Ry. Co., 3 L. R. Ex. 9.

[5] 2 N. Y. S. C. (Lansing), 361.

could not take place. The plaintiff then forbade the transportation, but the defendants proceeded in spite of the prohibition, and the goods were damaged by a collision while in transit. It was held that the misrepresentation rendered the contract as first made void and that the carriers were to be treated as though they had taken the goods subject to the common-law liability.

§ 263. The phrase "owner's risk" is common in contracts for the carriage of live stock and it has been held that it is competent for the carrier to restrict his liability in that way.[1]

Under such circumstances negligence will not be presumed. Where horses carried at the owner's risk were injured on the defendants' railroad by the breaking of a car wheel, new and apparently without defect, and evidence of negligence other than the fact of loss was wanting, it was held not to be error to direct a verdict for the carrier.[2] Where the action was for an injury to hogs by reason of delay in their transportation, it was said that in respect to the time of delivery, a carrier is responsible only for due diligence and may excuse delay by reason of accident or misfortune, though not inevitable. It is enough that he use proper endeavors to prevent delay.[3]

§ 264. The English cases construe the liability of the carrier of animals under such exceptions, yet more liberally. In Chippendale *v.* Yorkshire, etc., Railway Company[4] the plaintiff's cattle were being carried by the defendant under a ticket, at the foot of which was the clause: "N. B.—This ticket is issued subject to the owners taking all risks of conveyance whatever, as the company will not be liable for any injury or damage, however caused, and accruing to live stock of any description, travelling upon the Y. & L. Railway, or in their vehicles." The truck in which the animals were shipped was defectively constructed and unfit for use, and during the transit some of the cattle becoming frightened broke out and were killed. It was, nevertheless, held that there was no implied stipulation that

[1] Morrison *v.* Construction Co., 44 Wis. 405.

[2] Morrison *v.* Construction Co., *supra.*

[3] Nashville, etc., R. R. Co. *v.* Jackson, 6 Heisk. (Tenn.) 271.

[4] 15 Jur. 1106; S. C., 21 L. J. Q. B. 22, 7 Ry. Cas. 824.

the truck should be fit for the conveyance of cattle and that the defendants were protected by the terms of their contract.

In Austin *v.* Manchester, etc., Railway Company[1] there was issued a note or ticket containing the following notice: "This ticket is issued subject to the owner's undertaking to bear all the risk of injury by conveyance and other contingencies, and the owner is required to see to the efficiency of the carriage before he allows his horses or live stock to be placed therein; the charge being for the use of the railway, carriages and locomotive power only, the company will not be responsible for any alleged defects in their carriages or trucks, unless complaint be made at the time of booking, or before the same leave the station, nor for any damages, however caused, to horses, cattle, or live stock of any description travelling upon their railway or in their vehicles." It was held that giving to the words of the contract their most limited meaning they must apply to all risks of whatever kind and however arising to be encountered in the course of the journey and, therefore, that the company were not responsible for injury done to a horse from the firing of a wheel in consequence of the neglect of the servants of the company to grease it.

The declaration in Shaw *v.* York, etc., Railway Company[2] alleged that the defendant was proprietor of a railway, and that it had received from plaintiff a horse to be "safely and securely" carried to its destination for reward. Plaintiff had pointed out a defect in one of the partitions of a horse box shown to him for the reception of his horse. A servant of defendants then endeavored to make secure the partition and assured the plaintiff that he had done so. The horse was carried in the box and the horse's death was occasioned during the journey by the insecurity of the partition. At the foot of the receipt given for the horse was written: "N. B.—This ticket is issued subject to the owner's undertaking all risks of conveyance whatsoever, as the company will not be responsible for any injury or damage (however caused) occurring to horses or carriages while travelling, or in loading or unloading." Lord DENMAN held that

[1] 21 L. J. C. P. 179; S. C. 10 C. B. 453, 16 Jur. 763, 7 Ry. Cas. 300.

[2] 13 Jur. 385; 13 Q. B. 347; 18 L. J. Q. B. 181; 6 Ry. Cas. 87.

this memorandum formed part of the contract for the conveyance of the horse and that this disproved the averment in the declaration that the defendants received the horse to be "safely and securely" carried.

§ 265. In this connection it is, however, to be noted in passing that all the above cases were decided prior to the passage of the Railway and Canal Traffic Act of 1854,[1] when the rigor of the common law respecting the carrier's liability had, in England, been greatly modified. The act of 1854 may be said to have restored the common law in this regard.[2]

[1] 17 and 18 Vict. c. 31.

[2] Section 7 of this act provides that a railway company "shall be liable for the loss of or injury to any horse, cattle, or other animals, or to any articles, goods, or things in the receiving, forwarding, or delivering thereof, occasioned by the neglect of such company or its servants, notwithstanding any notice or condition made and given by such company, in anywise limiting such liability." This is extended by section 16 of the Regulation of Railways Act, 1868 (31 and 32 Vict. c. 119), to the traffic on board steamers belonging to or used by railroad companies. It has been held that the act of 1854 applies to the baggage of passengers, and that no phrase, such as "at passenger's risk," or the like, will exempt the carrier from the results of his own negligence. Cohen *v.* Southeastern Ry. Co., L. R. 2 Ex. D. 253, overruling Stewart *v.* London, etc., Ry. Co., 3 H. & C. 135.

CHAPTER XVIII.

EXCEPTIONS Continued—PERILS OF THE SEA.

"Perils of the sea," § 266.
Perils of the sea—definition, § 267.
Perils of the sea—inland navigation, § 268.
What are perils of the sea, §§ 269, 270.
Custom affecting the interpretation of the clause, § 271.
What are not perils of the sea, §§ 272, 273, 274.
Perils of the sea and negligence causing loss, § 275.
Perils of the sea must be shown to be necessary cause of loss, § 276.
Effect of clause when goods are stowed on deck, § 277.
Duty to protect the goods after damage by a peril of the sea, § 278.

§ 266. It would seem that the phrase "perils of the seas" was to be found in charter parties as early as the reign of Charles I. In Pickering *v.* Barclay,[1] decided in the latter part of that reign, a ship having been overpowered and plundered on the high seas by pirates, the question was raised whether the carrier was exonerated by this exception occurring in his charter party and evidence was taken to show the usage of the trade, to aid in the interpretation of the phrase. More recently many analogous phrases have been embodied in the bill of lading. Among these, such expressions as the following: dangers of the sea, perils of the river, perils of the lake, dangers of the river, dangers of the lake, perils of navigation, dangers of navigation, dangers incident to the navigation of the river, river risks, etc. The custom of carriers now is, to group together a number of such expressions in the hope of including one sufficiently general in its application to relieve from liability in any case of loss. Whether, however, such expressions add to the force and scope of the ancient phrase may well be

[1] Style, 132; S. C., 2 Rall. Abr. 248.

doubted. They have uniformly been treated by the courts as strictly synonymous with perils of the sea,[1] and shall be here so discussed. The phrases "inevitable accidents" and "unavoidable accidents" have been frequently placed in this category.[2]

§ 267. The definitions of perils of the sea to be found in the reports are numerous, ranging from those in a class of cases by no means small, which would make the phrase to be not more inclusive than the common law exception, the act of God,[3] to the other extreme of which a recent decision of Mr. Justice Woods may be given as a type, in which he asserts that "by dangers of the sea are meant all unavoidable accidents from which common carriers by the general law are not excused unless they arise from act of God."[4] Clearly the phrase is intended to be more inclusive than the common law exception.[5] Clearly, too, it is intended to include losses occurring partially through human agency as well as those to which the action of the elements has alone contributed.[6] On the other hand the phrase cannot be made to cover every hazard and danger from the beginning to the end of the voyage, of whatsoever kind, but will be limited to those which arise from the action of the elements, or which are peculiar to the water.[7] In Stephens Transportation Company *v.* Tuckerman,[8] dangers of the sea are said to be those accidents "peculiar to navigation that are of an extraordinary character or arise from an irresistible force or overwhelming power, which can not be guarded against by the

[1] Harrison *v.* Hixson, 4 Blackf. (Ind.) 226; Jones *v.* Pitcher, 3 Stew. & P. (Ala.) 135; McArthur *v.* Sears, 21 Wend. (N. Y.) 190; Johnson *v.* Friar, 4 Yerg. (Tenn.) 48; Whitesides *v.* Russell, 8 W. & S. (Pa.) 44; McGregor *v.* Kilgore, 6 Ohio, 358; Southern Express Company *v.* Palmer, 48 Ga. 85.

[2] Fowler *v.* Davenport, 21 Tex. 626; March *v.* Blythe, 1 McCord, 360; Friend *v.* Wood, 6 Gratt. (Va.) 189; U. S. *v.* Power, 6 Mon. T. 271; Lawson on Contracts of Carriers, § 165.

[3] Jones *v.* Pitcher, 3 Stew. &. P. (Ala.) 135.

[4] Dibble *v.* Morgan, 1 Woods, 411.

[5] Ferguson *v.* Brent, 12 Md. 9; McArthur *v.* Sears, 21 Wend. (N. Y.) 190; Redpath *v.* Vaughan, 52 Barb. (N. Y.) 489.

[6] McArthur *v.* Sears, 21 Wend. (N. Y.) 190.

[7] Merril *v.* Arey, 3 Ware, 215.

[8] 33 N. J. 543.

ordinary exertions of human skill and prudence." This would seem to be more exact than the definition of Mr. Justice STORY[1] in which he includes "only such losses as are of an extraordinary nature or arise from some irresistible force or some overwhelming power which cannot be guarded against by the ordinary exertions of human skill and prudence."[2]

§ 268. Applying this principle to internal commerce, it will be seen that "dangers of the river or lakes" in a bill of lading mean such natural accidents incident to river or lake navigation as could not have been avoided by skill, judgment and foresight.[3] Thus, also, the dangers of navigation of a public canal are such as are incident to a trip made in conformity to the public regulations of the canal, of which the carrier is bound to take notice, while for damages following the breach of such regulations he will be liable.[4] Where the clause "risk of boats excepted," or a similar phrase, is added to the usual form of the exception under consideration, it would seem, on the authority of Johnston *v.* Benson,[5] that the carrier's immunity from responsibility under the terms of the bill of lading is extended to cover the goods after they have been taken from

[1] In "The Reeside," 2 Sumn. 571.

[2] Richards *v.* Hausen, 1 Fed. Rep. 54; Tysen *v.* Moore, 56 Barb. (N. Y.) 442; The Northern Bell, 1 Biss. 529; The Niagara *v.* Cordes, 21 How. 7; Bearse *v.* Ropes, 1 Sprague, 331; The Brantford City, 29 Fed. Rep. 373; The Polynesia, 30 ib. 210; The Bergenseren, 36 ib. 700; The Willard, 28 ib. 759.

Chancellor Kent thus defines the phrase (Kent's Commentaries, vol. iii. p. 301, tenth ed.): "Perils of the Sea" denote natural accidents peculiar to that element, which do not happen by the intervention of man, nor are to be prevented by human prudence. For other definitions see Arnold on Marine Insurance, vol. ii. p. 817.

[3] Hill *v.* Sturgeon, 28 Mo. 323; Johnson *v.* Friar, 4 Yerg. (Tenn.) 48; Gordon *v.* Buchanan, 5 ib. 70; Turney *v.* Wilson, 7 ib. 340; Slocum *v.* Fairchild, 7 Hill (N. Y.) 292; Fairchild *v.* Slocum, 19 Wend. (N. Y.) 329.

It is to be noted, however, that navigation on the great lakes has been held not to be inland navigation in the sense of coming under the Acts of Congress regulating the liability of carriers. Moore *v.* Transportation Co., 24 Howard, 1.

In Transportation Co. *v.* Dormer, 11 Wall. 129, it is said that dangers of lake navigation include all the ordinary perils which attend navigation on the lakes, among others that which arises from the shallowness of the waters at the entrance of harbors.

[4] Atwood *v.* Reliance Transportation Co., 9 Watts (Pa.), 87.

[5] 4 Moore, 90; S. C. B. & B. 454.

the ship and are being landed in small boats, as in certain parts of the world is necessary.[1]

§ 269. The following have been held to be within this exception or its equivalents: The unavoidable stranding of the vessel;[2] the running upon an unknown rock,[3] or upon a hidden obstruction in a river, such as a tree recently fallen,[4] or a snag recently carried into the channel;[5] storm or stress of weather;[6] a sudden squall;[7] the tossing of a ship in tempestuous weather;[8] the shipping of water in a storm;[9] the necessary jettison of the cargo in a storm;[10] delay caused by storm,[11] fog,[12] piracy,[13] the

[1] Ordinarily, damage to a wharf-boat is not a "peril of the sea." St. Louis, etc., R. R. Co. *v.* Smuck, 49 Ind. 302.

[2] Hahn *v.* Corbett, 2 Bing. 205; Phœnix Ins. Co. *v.* E. & W. T. Co., 10 Biss. 18; Bostwick *v.* B. & O. R. R. Co., 55 Barb. (N. Y.) 137.

[3] Fletcher *v.* Inglis, 2 B. & Ald. 315; Turney *v.* Wilson, 7 Yerg. (Tenn.) 340; The Keokuk, 1 Biss. 522; Van Hern *v.* Taylor, 2 La. Ann. Rep. 587; Boyce *v.* Welch, 5 ib. 623; Collier *v.* Valentine, 11 Mo. 299.

"The rule which imputes carelessness to a captain whose boat strikes a known rock or shoal unless driven by a tempest is only applicable to the navigation of the ocean, where rocks and shoals are marked upon maps and may be avoided, and does not apply to the navigation of the Western rivers. There each case must be governed by its own circumstances and be tested by the course usually pursued by skilful pilots in such cases." Collier *v.* Valentine, 11 Mo. 299.

[4] Hibernia Ins. Co. *v.* St. Louis Trans. Co., 5 McCrary, 397.

[5] The Favorite, 2 Biss. 502; Redpath *v.* Vaughan, 52 Barb. (N. Y.) 489, affirmed 48 N. Y. 655; Johnson *v.* Friar, 4 Yerg. (Tenn.) 48; Steele *v.* McTyer's Admr., 31 Ala. 667; Hib. Ins. Co. *v.* St. Louis Trans. Co., 120 U. S. 166.

[6] The Neptune, 6 Blatchf. 193; Hooper *v.* Rathbone, Taney Dec. 519.

[7] Slocum *v.* Fairchild, 19 Wend. (N. Y.) 329, affirmed 7 Hill (N. Y.), 292; The Lady Pike, 2 Biss. 141. But see The Mollie Mohler, ib. 505, affirmed 21 Wall. 230.

[8] Gabay *v.* Lloyd, 3 B. & C. 793; Christie *v.* The Craigton, 41 Fed. Rep. 62.

[9] Hooper *v.* Rathbone, 1 Taney Dec. 519; Lemaitre *v.* Merle, 2 Robin (La.), 402; Letchford *v.* The Golden Eagle, 17 La. Ann. Rep. 9; Bradley Fertilizer Co. *v.* The Edwin L. Morrison, 40 Fed. Rep. 501.

[10] Van Syckel *v.* The Thomas Ewing, Crabbe, 405; Smith *v.* Shepherd, Abbot on Shipping, Pt. IV., c. IV., § 2, p. 235–287 (10th ed.); Nemours *v.* Vance, 19 How. 162; Lawrence *v.* Minturn, 17 ib. 100; The Portsmouth, 9 Wall. 682; Ins. Co. *v.* Sherwood, 14 How. 365.

[11] U. S. *v.* Hall, 2 Wash. C. C. 366; Lewis *v.* The Success, 18 La. Ann. Rep. 1; Jackson *v.* Union Marine Ins. Co., 44 L. J. C. P. 27.

[12] The Rocket, 1 Biss. 354; The Portsmouth, 9 Wall. 682.

[13] Pickering *v.* Barclay, Style, 132;

wilful but not the barratrous act of the crew;[1] the sweating of the cargo;[2] dampness caused by a change of climate;[3] the accidental sinking of the ship;[4] the breaking of tackle;[5] collision;[6] the deflection of the needle of the compass;[7] the "blowing" of a vessel,[8] or the opening of the seams of a ship, caused by straining in rough weather.[9]

§ 270. In "The Juniata Paton"[10] the libellant had shipped certain hogsheads of sugar, to be delivered in good order, "the dangers of navigation excepted." The vessel reached the port of Milwaukee, its place of destination, on a dark and stormy night and the captain, mistaking a light on shore for the pier light, it being in the same range and resembling the pier light, in attempting to enter the harbor, ran the vessel aground. It appearing that there had been no lack of care on the part of the carrier; this was held to be a loss within the exception.

A loss may be by a "peril of the sea," though happening in port. Thus a vessel laden with goods had arrived in port; taken into a dock to discharge her cargo, and for this purpose was fastened by tackle on one side to a loaded lighter and on the other to a barge lying between her and the wharf. The tackle by which she was fastened to the lighter broke, in consequence of which she careened over and water got into her ports and the goods yet on board were damaged. This loss was within the exception in the bill "all and every dangers and accidents of

Barton *v.* Wolliford, Comb. 56; Morse *v.* Slue, 1 Vent. 190; 1 Kent's Com., p. 302; Abbot on Shipping, Pt. IV., c. VI., § 2, p. 288 (10th ed.); 1 Kay on Shipping, p. 411.

[1] Dixon *v.* Sadler, 9 L. J. Ex. 48.

[2] Clark *v.* Barnwell, 12 How. 272; The Star of Hope, 17 Wall. 651.

[3] Rich *v.* Lambert, 12 How. 347; Clark *v.* Barnwell, ib. 272.

[4] Kirk *v.* Folsom, 23 La. Ann. Rep. 584; Palmer *v.* Lorillard, 16 Johns. (N. Y.) 348.

[5] Laurie *v.* Douglas, 15 M. & W. 745.

[6] Pilasted *v.* B. K. Nav. Co., 27 Me. 132; The New Jersey, Ole. 444; The Bernina, L. R., 12 P. D. 36; Peters *v.* Warren Ins. Co., 14 Pet. 99; Marsh *v.* Blythe, 1 McCord, 360; Van Horn *v.* Taylor, 2 La. Ann. Rep. 587; Daggett *v.* Shaw, 3 Mo. 189; Hays *v.* Kennedy, 3 Grant (Pa.), 351.

[7] The Rocket, 1 Biss. 354.

[8] Crosby *v.* Grinnell, 9 N. Y. Leg. Obs. 281; East Tenn., etc., R. R. Co. *v.* Wright, 76 Ga. 532.

[9] Rich *v.* Lambert, 12 How. 347. But see Bearse *v.* Ropes, 1 Sprague, 331.

[10] 1 Biss. 15.

the seas and navigation."[1] So in Davidson *v.* Burnand,[2] where a steamer was loading in a harbor and her draught increased by reason of the weight of the cargo until the discharge pipe was brought below the surface of the water, which then flowed down the pipe under the valve, and some cocks or valves in the machinery having been negligently left open water flowed into the hold and injured the cargo, this was said to come within the exception.

§ 271. It has been held in some cases that evidence of a custom may be introduced to define the phrase "perils of the sea,"[3] and a series of Alabama cases go to the extent that by evidence of mercantile usage and understanding even loss by fire may be brought within the purview of this exception.[4] This is not elsewhere the law (if, indeed, it is in that State[5]), and the Supreme Court of the United States have held the reverse in Parrison *v.* Memphis Insurance Co.[6]

In the New York case of Aymar *v.* Astor[7] evidence to show that injuries by rats were considered, by custom, as among dangers of the seas was excluded and in "The Reeside,"[8] Mr. Justice STORY refused to admit evidence to the effect that "dangers of the seas" extend by usage to all losses, except those arising from neglect, in these words: "The true and appropriate office of a usage or custom is to interpret the otherwise indeterminate intention of parties and to ascertain the nature and extent of their contracts arising, not from express stipulations, but from mere implications and presumptions and acts of a doubtful and equivocal character. It may also be admitted to ascertain the true meaning of a particular word, or of particular words, in a given instrument, when the word or words have various senses, some common, some qualified and some technical, according to the subject-matter to which they are applied. But I apprehend

[1] Laurie *v.* Douglas, 15 M. & W. 746.

[2] L. R., 4 C. P. 117.

[3] In the early times such evidence seems to have been admitted. Pickering *v.* Barclay, 2 Roll. Ab. 248; Barton *v.* Wolliford, Comb. 56.

[4] Hibler *v.* McCartney, 31 Ala. 501; Sampson *v.* Lindsay, 6 Porter (Ala.), 123; Steele *v.* McTyer's Adm., 31 Ala. 667.

[5] Boon *v.* The Belfast, 40 Ala. 184; Lawson on Contract of Carriers, § 13.

[6] 19 How. 312.

[7] 6 Cow. 266.

[8] 2 Sum. 567.

it can never be proper to resort to any usage or custom to control or vary the positive stipulations of a written contract and *a fortiori* not in order to contradict them."

§ 272. The following have been held not to fall within the exception under consideration—loss by fire,[1] by rats,[2] by vermin,[3] by worms destroying the ship's bottom,[4] by embezzlement,[5] by theft or robbery which is not piracy,[6] by barratry,[7] by the injurious effects of other goods,[8] by the shifting of a buoy,[9] by the desertion or insubordination of seamen,[10] by the explosion of the boiler of a steamboat,[11] by the plundering of the ship by a custom-house officer while in charge of it,[12] by the depredations committed on the ship's stores or cargo by her passengers and crew, in consequence of a scarcity of provisions, during a long voyage.[13] These and similar causes of loss are excluded from the operation of the exception by the fact that they are not such dangers as "proceed from or are peculiar to the water."[14]

[1] Garrison *v.* Memphis Ins. Co., 19 How. 312; Gilmore *v.* Carman, 1 S. & M. (Miss.) 279; Cox *v.* Peterson, 30 Ala. 608; Merrill *v.* Arey, 3 Ware, 215; Union Mutual Ins. Co. *v.* Indianapolis, etc., R. R. Co., 1 Disney, 480; Hong Kong, etc., Banking Corp. *v.* Baker, 7 Bom. H. C. Rep. O. C. J. 203. But see U. S. *v.* Power, 6 Mon. T. 271 (River risk excepted).

[2] Kay *v.* Wheeler, 2 L. R. C. P. 302; Lavemie *v.* Drury, 8 Exch. 166; S. C., 22 L. J. Exch. 2. Though every possible precaution be taken to prevent the loss, it is still without the exception. The Isabella, 8 Ben. 139; The Carlotta, 3 Asp. Mar. Law Cas. N. S. 456; 4 Irish Jur. 237; Aymar *v.* Astor, 6 Cow. 266; Hunter *v.* Potts, 4 Camp. 203.

[3] The Miletus, 5 Blatchf. 335.

[4] Rohl *v.* Parr, 1 Esp. 445.

[5] King *v.* Shepherd, 3 Story, 349.

[6] Ib. Abbot on Shipping, pt. 4, c. 6, § 2, p. 289 (10th ed.).

[7] The Chasca, L. R., 4 Adm. 446; S. C., 44 L. J. Adm. 17; The Goldhunter, Blatch. & H. 300; The Ethel, 5 Ben. 154.

[8] The Antoinetta C., 5 Ben. 564; The Freedom, L. R., 3 P. C. 594; see Daggett *v.* Shaw, 3 Mo. 189.

[9] Reeves *v.* Waterman, 2 Spears, 197.

[10] The Ethel, 5 Ben. 154.

[11] The Mohawk, 8 Wall. 153; The Edwin, 1 Sprague, 477; Bulkley *v.* Naumkeag, etc., Co., S. C. 24 How. 386; *contra*, Adams Ex. Co. *v.* Fendrich, 38 Ind. 150.

[12] Schieffelin *v.* Harvey, 6 Johns. (N. Y.) 170.

[13] The Gold Hunter, Blatch. & H. 300.

[14] Opinion of Sharkey, C. J., in Gilmore *v.* Carman, 1 S. & M. (Miss.) 279.

§ 273. Another class of causes which have also been held to be without the exception, are those in which the loss is in whole or in part the result of the negligence of the carrier. Such are unskilfulness of the pilot,[1] lack of proper ventilation,[2] bad stowage,[3] damage from water made possible by bad stowage,[4] or loss of the goods by being washed overboard when stowed on deck without the consent of the shippers,[5] a leak not shown to have been caused by the irresistible action of the elements,[6] a collision occasioned by negligence of the vessel's crew,[7] the dampness or sweating of the hold of a vessel when shown to be the ordinary accompaniment of a voyage from southern to northern ports and to result not from tempestuous weather, but from occult atmospheric causes;[8] the insufficiency or unseaworthiness of the vessel;[9] the ordinary rolling of a vessel in a cross sea, being an ordinary incident of a voyage;[10] the striking on a rock, the presence of which is indicated by a buoy;[11] the beaching of a ship within the tideway so that she might be repaired, by which act she is bilged and damaged.[12] Low water in a river rendering it unnavigable, it has been frequently held is not to be classed among the dangers of the river, which absolve a carrier from his obligation;[13] or, as the same principle has been rather tersely put in a Minnesota case, the phrase "dangers of navigation" does not mean the want of navigation.[14]

[1] Harvey *v.* Pike, N. C. Tem. Rep. 82; S. C. J. Am. Dec. 698.

[2] The Freedom, L. R., 3 P. C. 594.

[3] The Rebecca, 1 Ware 188; The Newark, 1 Blatch. 203; The Casco, Davies, 184.

[4] Richards *v.* Hansen, 1 Fed. Rep. 54; Fleming *v.* Marine Ins. Co., 3 W. & S. (Pa.) 144.

[5] Dorsey *v.* Smith, 4 La. 211; The Rebecca, 1 Ware 188; The Casco, Davies, 184; The Newark, 2 Blatchf. 203.

[6] The Emma Johnson, 1 Sprague, 527; The Compta, 4 Sawyer, 375; The Spring, 29 Fed. Rep. 397.

[7] Grill *v.* Gen. Iron Screw Colliery Co., 1 L. R., C. P. 600; Lloyd *v.* Gen. Iron Screw Colliery Co., 33 L. J. Exch. 269; S. C., 3 H. & C. 284.

[8] Baxter *v.* Leland, Abb. Adm. 348; but see Rich *v.* Lambert, 12 How. 347.

[9] The Northern Belle, 1 Biss. 529.

[10] The Reeside, 2 Sumner, 567.

[11] Ferguson *v.* Brent, 12 Md. 9.

[12] Thompson *v.* Whitmore, 3 Taunt. 127.

[13] Mahon *v.* The Olive Branch, 18 La. Ann. Rep. 107; Hatchett *v.* The Compromise, 12 ib. 783; Broadwell *v.* Butler, 1 Newb. 171; S. C., 6 McLean, 296; Cox *v.* Peterson, 38 Ala. 608; Transportation Co. *v.* Downer, 11 Wall. 129.

[14] Cowley *v.* Davidson, 13 Minn. 92.

§ 274. "Loss on the lakes (or rivers)," it has been said, does not include loss of goods in a wharf boat.[1] Loss by lightning, though an act of God, is not a peril of the sea,[2] nor is being fired at by the vessel of the enemy, though this is clearly within the common law exception, the public enemy.[3] These distinctions are, however, of little practical value, since the expression of such phrases as that under consideration is not the exclusion of the implied common law exceptions.

If a vessel be driven by stress of weather upon an enemy's coast and be there captured, it is not a "peril of the seas."[4] So, where the master of a vessel was unwilling to put to sea through fear of capture by an enemy, war having been declared against the nation under whose flag he was sailing while he was at an intermediate port, this was not within the exception,[5] and in Spence *v.* Chadwick,[6] where it was shown that goods in transit had been confiscated as contraband, at Cadiz, under the laws of Spain; this was said to be not within the meaning of the phrase and in as much as the plea did not set up that the shipper knew that the goods were contraband or allege any wrongful act on his part, the carrier was held liable.

§ 275. The question of the existence of negligence is frequently of great importance in determining whether the exception will serve as a release from liability. "If a ship perish by striking on a rock or shallow" (to quote from Abbot on Shipping),[7] "the circumstances under which the event takes place must be ascertained in order to find out whether it happened by a peril of the sea or the fault of the master." Where it is clear that by the exercise of discretion and foresight the loss might have been prevented, it is idle to show that natural causes, which otherwise would constitute a peril

[1] St. Louis, etc., R. R. Co. *v.* Smuck, 49 (Ind.) 302.

[2] Hong Kong, etc., Banking Corp. *v.* Baker, 7 Bomb. H. C. Rep. 204.

[3] Bever *v.* Tomlinson, Abbot on Shipping, p. 290 (10th ed.); Cullen *v.* Butler, 1 Stark. 138; S. C., 5 M. & S. 461.

[4] Green *v.* Emslie Peaks, N. P. C. 278; Hahn *v.* Corbett, 2 Bing. 211. The rule in the United States would seem to be otherwise. United States *v.* Hall, 2 Wash. C. C. 366.

[5] The Patria, L. R., 3 Adm. 436.

[6] 10 Q. B. 517; S. C., 16 L. J. Q. B. 313; 11 Jur. 872.

[7] Page 388, 5th Am. ed.; see cases cited in notes.

of the seas, have contributed to the production of the disaster.[1]

In an early case[2] the law was thus laid down: "If the situation of the rock or shoal be generally known and the ship be not forced upon it by adverse winds or tempests, the loss is to be imputed to the fault of the master." So where a boat upon the Ohio river ran upon a stone and knocked a hole in her hull, it was held, that in order to bring the case within the exception "dangers of the river," it was incumbent on the carrier to show that due diligence and proper skill had been used to avoid the accident.[3] The question of the existence of negligence is, however, always for the jury.[4]

§ 276. It is not, however, sufficient to show merely the existence of a peril of the sea. It must be shown that the sea peril not only existed and that it was the cause of loss, but that it was a necessary cause of loss.[5]

Thus where a master attempted to enter a port in a thick fog and wrecked his vessel, there being no necessity for his making the attempt at that time, this was not a peril of the seas.[6] So, also, where a vessel about to sink from the effects of bad weather puts into an intermediate port and the master sells the ship and cargo without a necessity for so doing, this is not within the exception.[7] Where there was doubt as to whether a collision was attributable to the master's neglect or

[1] Spence *v.* Daggett, 2 Vt. 92; Williams *v.* Branson, 1 Murph. (N. C.) 417; Jones *v.* Pitcher, 3 St. & P. (Ala.) 135; Bazin *v.* Steamship Co., 3 Wall., Jr. 229.

[2] Williams *v.* Branson, 1 Murph. N. C. 417.

[3] Whitesides *v.* Russell, 8 W. & S. (Pa.) 44. It would seem, from some of the cases, that negligence is to be *imputed* where the carrier runs his vessel against a known rock. Collier *v.* Valentine, 11 Mo. 299; Fergusson *v.* Brent. 12 Md. 9; Williams *v.* Grant, 1 Conn. 487; Fletcher *v.* Inglis, 2 B. & Ald. 315; Tumey *v.* Wilson, 7 Yerg. (Tenn.) 340; The Keokuk, 1 Biss. 522; Van Horn *v.* Taylor, 2 La. Ann. Rep. 587; The Ocean Wave, 3 Biss. 317; Gordon *v.* Buchanan, 5 Yerg. (Tenn.) 71.

[4] Gordon *v.* Buchanan, 5 Yerg. (Tenn.) 71; March *v.* Blyth, 1 N. & M. 170; McClure *v.* Hammond, 1 Bay 99; Humphreys *v.* Reed, 6 Whart. (Pa.) 435.

[5] The Compta, 4 Sawy. 375; Speyer *v.* The Mary Belle Roberts, 2 Sawy. 1; The Costa Rica, 3 Sawyer, 538; Cannan *v.* Meaburn, 1 Bing. 243.

[6] The Costa Rica, 3 Sawyer, 538.

[7] Cannan *v.* Meaburn, 1 Bing. 243.

to causes beyond his control, the loss was held to fall within the excepted perils.[1]

§ 277. Where the bill of lading declares that the goods are to be stowed on deck and excepts "perils of the sea," the circumstances of the case are to be carefully considered. Says Mr. Justice CURTIS in Lawrence *v.* Minturn:[2] "The question is not what under other circumstances, would be deemed a peril of the sea, but what is to be deemed such when operating on this vessel with this deck load." In this case the jettison of the deck load was held to be justifiable.

§ 278. Where the goods have been damaged by water, it is the duty of the carrier to prevent further injury,[3] if necessary by opening the packages and drying the goods,[4] and where through an unquestioned sea peril, bilge water slowly entered the cabin where was a box of books and the carrier had ample time to remove them to a place of safety, it was held that he could not take shelter from his liability to answer for his negligence in not preserving the goods under this exception.[5] In general it may be said that the rules in the cases of the act of God and negligence concurring as causes of loss, apply with equal force to the exception, peril of the sea, when modified by the negligence of the carrier.

[1] Buller *v.* Fisher, Abbot on Shipping, p. 289, tenth Am. ed.

[2] 17 How. 100, 112. See also Hand *v.* Baynes, 4 Whart. (Pa.) 204.

[3] Bird *v.* Cromwell, 1 Mo. 58.

[4] Chouteaux *v.* Leach, 18 Pa. St. 224.

[5] Steamboat Company *v.* Bason, Harp. (S. C.) 262.

CHAPTER XIX.

EXCEPTIONS CONTINUED—LOSS OF PERISHABLE GOODS—LOSS BY INHERENT DEFECT—BY DETERIORATION—BY DECAY.

Carriers are not liable for loss which is the result of the "inherent nature of the goods" shipped, § 279.
"Perishable goods," § 280.
"Inherent defect—deterioration—decay," §§ 281, 282.
Exception does not relieve from negligence, §§ 283, 284.
Carrier's duty is measured by the circumstances of each case, § 285.
Master's duty to open packages, § 286.
Master's duty in regard to the sale of injured goods, § 287.
Master should communicate with the owners, § 288.
Right of a carrier by land to sell perishable goods, § 289.

§ 279. "INJURY to perishable goods," "loss by inherent defect," "loss by deterioration," "loss by decay" and similar expressions usually found among the printed exceptions of the bill of lading are not to be considered as limiting in a material degree the carrier's original liability.

At the common law the carrier could not be held for such loss as was the result of the nature, vice, or defect inherent in the goods carried and in no sense the result of his own negligence. Says Mr. Justice STORY in his treatise on Bailments: "Although the rule is laid down in general terms at the common law that the carrier is responsible for all losses not occasioned by the act of God, or of the king's enemies; yet it is to be understood in all cases that the rule does not cover any losses not within the exception, which arise from the ordinary wear and tear and chafing of the goods in the course of their transportation, or from their ordinary loss, deterioration in quantity or quality in the course of the voyage, or from their inherent natural infirmity and tendency to damage. . . . . Thus, for example, the carrier is not liable for any loss or damage from the ordinary decay or deterioration of oranges or other fruits in the course of the voyage from their inherent infirmity or

nature, or from the ordinary diminution or evaporation of liquids, or the ordinary leakage from the casks in which the liquors are put, in the course of the voyage, or from the spontaneous combustion of goods or their tendency to effervesce."[1]

§ 280. Of the exceptions under consideration, the phrase "perishable goods" is perhaps the least broad in its application. In an Illinois case,[2] perishable property is defined as "that which from its nature decays in a short space of time, without reference to the care it receives." "Of that character," it was said, "are most varieties of fruits, some kinds of liquors, and numerous vegetable productions." Merchantable corn was held not to be within the exception.

§ 281. The other phrases, however, are more liberally construed, as indeed is the common law rule. Thus, a cargo of hemp could not, under the most liberal construction of the phrase, be termed perishable property, yet where the destruction of the hemp by fire was shown to have been caused by self-ignition, the carrier was held to be discharged at common law.[3] So where potatoes were shipped at Hamburg, to be delivered in New York and the evidence showed that they were in bad condition when shipped, the vessel was not held liable for their loss.[4] Where the plaintiff loaded heavy machinery upon a platform-car and blocked its wheels with insufficient blocking, insecurely nailed, by reason whereof the machinery, while being transported, broke from its fastening and was injured, without fault of the defendant in the running of the train or the maintenance of the track, it was held that the defendants were not liable, even though their servants saw the fastening and noticed their insufficiency before the injury was done.[5]

§ 282. This class of exceptions will include ullage, or the quantity of liquid a cask, on being gauged, lacks of being full.[6] Hence, in Warden *v.* Green,[7] where the action was for the value of a large quantity of molasses lost because of the expansion of

[1] Story on Bailments, § 492, *a*.

[2] Illinois, etc., R. R. Co. *v.* McClellan, 54 Ill. 58.

[3] Boyd *v.* Dubois, 3 Camp. 133.

[4] The Ship Howard *v.* Wissman, 18 How. 231.

[5] Ross *v.* R. R. Co., 49 Vt. 364.

[6] Angell on Carriers, § 211.

[7] 6 Watts (Pa.), 424. The loss is here incorrectly attributed to the act of God.

the goods caused by the warm weather and because of the insufficiency of the casks, the carrier was discharged. So in Nelson *v.* Woodruff,[1] where the goods were lard in casks and the loss was occasioned by the melting of the lard on a voyage to a Southern port, the loss was held to be within the common law exceptions. Where the loss has been occasioned by secret defects in the casks, boxes, or packages containing the goods, the carrier is not liable.[2]

§ 283. The exoneration of the exceptions under consideration does not, however, extend to a loss to which the carrier's own negligent act, or misconduct has contributed. The decay of fruit or grain, though ordinarily within the exceptions,[3] will not excuse the carrier if he has failed to secure proper ventilation for the goods[4] and the loss of meat will not be within the relief of the exception "decay" in the event of the failure of the carrier to provide sufficient ice to keep it during the voyage.[5] In Lewis *v.* The Ship Success,[6] where a ship, loaded to an average depth with grain for New Orleans, was delayed sixty-seven days by an unusually low stage of the water of the Mississippi River and on arrival the grain was found much damaged, it was held that though the general principle was, where the damage proceeded from the nature of the property whether in any situation whatever, or only in the confinement of the ship, that the ship-owners were liable, that this did not apply where there had been want of due diligence in ventilating and caring for the grain during the detention.

§ 284. In "The Ship Invincible,"[7] wine had been shipped from New York to San Francisco and by reason of the omission of the carrier's servants to provide proper and necessary ventilation, had been, in part at least, injured on the journey. The language of the Court was as follows: "I think it clear

[1] 1 Black, 156.

[2] Hudson *v.* Baxendale, 2 Hurl & N. 575; Nelson *v.* Woodruff, *supra;* Warden *v.* Green, ib.

[3] Story on Bailments, § 492 *a*; The Brig Collenberg, 1 Black, 170; Acatos *v.* Burns, 47 L. J. (N. S.) Q. B. 566; The Norway, 12 L. T. (N. S.) 57.

[4] Davidson *v.* Gwynne, 12 East. 381; The America, 8 Ben. 491; The Collenberg, *supra.*

[5] Sherman *v.* Inman S. S. Co., 26 Hun (N. Y.), 107.

[6] 18 La. Ann. Rep. 1.

[7] 3 Sawyer, 176.

that in this case it was the obvious duty of the master to use the efficacious means at his disposal to prevent or check the damage which the goods might sustain from natural causes and that to relieve him from that duty he must establish by a preponderance of proof that the shipper dispensed with its performance. This he has, in my view of the evidence, failed to do."

An interesting case is that of Hutchinson *v.* Guion.[1] The declaration was against the carrier for the loss of a quantity of salt cake, through alleged negligence in stowage. The plea set forth that salt cake is a corrosive substance; that the goods in question were delivered to the defendant in bulk, whereas they should have been packed in cases; that the plaintiffs induced the defendants to believe that the goods were properly packed; that the defendants, ignorant of the nature of salt cake, had stowed it in contact with certain casks containing salt provisions; that the salt cakes had rotted and destroyed these casks and that the brine therefrom had damaged the salt cake. The replication set up that salt cake is an article of merchandise well known in trade and commerce and that the defendants well knew, or should have known, its nature. The plea was held to be good and the replication insufficient. It is not enough that the carrier take reasonable care of the goods, he must employ active measures to secure their safety. Mere passive oversight is not sufficient.

§ 285. To determine what is to be expected of the carrier, respect must be had to the character of the goods and the circumstances of each case. If the goods have become wetted and are liable to be injured thereby, he should, if possible, unpack and dry them.[2] If a cargo of hides is liable to be destroyed by worms, he should have the skins beaten and ventilated.[3] If a horse is left in the carrier's custody, he is bound to feed it, though he may recover from the owner the cost of its keep.[4]

Referring to the duties of the master of a ship, Mr. Parsons,

[1] 5 C. B. N. S. 149.

[2] Chouteaux *v.* Leach, 18 Pa. St. 224; The Niagara *v.* Cordes, 21 How. 7; Blocker *v.* Whittenburg, 12 La. Ann. Rep. 410.

[3] The Bark Gentleman, Olcotts's Adm. 110; S. C., 1 Blatch. 196; Rogers *v.* Murray, 3 Bosw. 357.

[4] Great Northern R. W. Co. *v.* Swaffield L. R., 9 Exch. 132, 136.

in his treatise on Shipping, says: "Generally and in the exercise of his duties as master, he is a stranger to the cargo between the lading and the unlading. But exigencies and emergencies may arise, in which the master becomes, of necessity, supercargo or consignee, or to speak more correctly, is clothed with whatever agency or authority may be needed to protect the property and interests intrusted to him."[1] In other words, the character of agent for the shipper is thrown upon him by a policy of law.[2]

§ 286. In the line of this principle, it has been decided that the master may and must open packages containing goods liable to be lost;[3] but he is not bound either to repair the goods or to delay the voyage for the sake of saving them.[4] In extreme cases he may and must sell the goods, as where they have been so far damaged that they will be lost or their value materially diminished unless he does so.[5] This rule applies, however, only where it is impossible to transship the goods and only where it is impossible to communicate with and obtain instructions from the owner.

§ 287. In Acatos *v.* Burns,[6] an action was brought against a ship-owner for the non-delivery of a cargo of maize, which had become heated and had been sold by the defendant at an intermediate port. The jury found that the cargo had been damaged by its own inherent vice; that it had been impossible to carry it to the port of destination; that the sale was what a prudent man would have done under the circumstances, but that there had been no such urgent necessity for the sale as to give no time or opportunity to give notice to the plaintiff, the owner of the cargo. It was held that on these findings the defendant had no right to sell the goods without the plaintiff's assent and that the action would lie.

[1] Parsons on Shipping, II., p. 22.

[2] The Gratitudine, 3 Rob. Ad. 240, 260.

[3] Bird *v.* Cromwell, 1 Mo. 58; Chouteaux *v.* Leach, 18 Pa. St. 224.

[4] The Lynx *v.* King, 12 Mo. 272; Soule *v.* Rodocanachi, 1 Newb. Adm. 504; Notara *v.* Henderson, L. R., 5 Q. B. 346. In the case of Brown *v.* Clayton, 12 Ga. 564, the carrier was allowed to recover money spent in fitting for market the goods which had been injured on the voyage.

[5] Flierboom *v.* Chapman, 13 M. & W. 230; Acatos *v.* Burns, 47 L. J. (N. S.) Q. B. 566; Notara *v.* Henderson, L. R., 5 Q. B. 346.

[6] *Supra.*

§ 288. It is the master's first duty, where practicable, to communicate with the owners. He can be the agent for them only *ex necessitate rei*;[1] or, as the law is put in a recent English case,[2] to justify the carrier in selling the goods he must show first a necessity for the sale; second, his inability to communicate with the owners. In this case wool was shipped from Rockhampton, in Australia, for England. When but a short distance from the port of departure the vessel was wrecked. The wool was saved, but in a heated condition. Means were not at hand to stop the fermentation of the goods and they were sold. There was but little question as to the advisability of the sale; the question being rather as to the necessity of informing the owners. The court said: "There can be no doubt that the master is bound to employ the telegraph as a means of communication where it can be usefully done, but in this case the state of the particular telegraph, the way it was managed and how far explanatory messages could be transmitted by it, having regard for the time and circumstances under which the master was placed, were proper subjects to be considered by the jury, together with the other facts, in determining the practicability of communication."[3]

§ 289. The right to sell perishable goods to avoid their total destruction, seems to apply to carriers by land no less than to carriers by sea. In American Express Company *v.* Smith,[4] a railroad company had been carrying a consignment of peaches and travel over the company's line being of necessity and without fault interrupted, it was found impossible to forward them. They could not be transshipped and were sold for what they would bring. The carrier was not liable for the loss to the shippers.

[1] The Hamburg, 33 L. J. (N. S.) Adm. 116; The Norway, 12 L. J. (N. S.) 57.

[2] Australasian, etc., Nav. Co. *v.* Morse, L. R., 4 P. C. 222.

[3] The Lizzie, L. R., 2 Adm. 254; Droege *v.* Suart., L. R., 2 P. C. 505.

[4] 33 O. St. 511.

CHAPTER XX.

EXCEPTIONS CONTINUED—PIRATES AND ROVERS—PUBLIC ENEMY—RATS AND VERMIN.

Loss by "pirates," generally, § 290.
What are losses by pirates, § 291.
Who are "public enemies," §§ 292, 293.
What are not losses by the public enemy, § 294.
The exception does not relieve the carrier from the result of his negligence, § 295.
The loss must be the proximate result of the negligence, § 296.
Effect of declaration of war upon the carrier's obligation, § 297.
Loss by "rats" is not a peril of the sea, § 298.
Loss by "vermin" is not a peril of the sea, § 299.

§ 290. "Loss by pirates" has been held to fall under both the exception "perils of the seas" and "the king's enemies." It is, nevertheless, sometimes separately expressed in bills of lading. It is, however, to be noted that capture by pirates differs from capture by the public enemy in this, that it does not divest the title of the owner to the goods. The English statute providing for restitution of property if retaken by the original owner is of very early date.[1] A definition of the crime of piracy is not within the purpose of this treatise and, indeed, would not be found to be exactly coincident with the meaning of the exception under consideration.[2] Thus, robbery on a river where the tide ebbs and flows is not piracy within the terms of a bill of lading, even though it be punishable as such under the laws of the United States.[3]

§ 291. The following cases have been held to come under

[1] 27 Ed. III. St. 2, c. 13, Y. B., 2 Rich. 3, 2; see Atkinson on Shipping, p. 118.

[2] Angell on Carriers, note to § 200 (5th ed.); Abbott on Shipping, p. 27, Story's Notes; Russell on Crimes, vol. II. c. 8, §§ 1, 2, and notes; U. S. *v.* Smith, 5 Wheat. 153; U. S. *v.* Palmer, 3 Wheat. 610; The Magellan Pirates, 25 Eng. Law & Eq. Rep. 595.

[3] The Belfast *v.* Boon, 41 Ala. 50.

the exception loss by pirates: (1) Where a vessel was taken out of her course by her crew and the goods were seized and part of them sold.[1] (2) Where emigrant coolie passengers murdered the captain and part of the crew, took possession of the vessel and ran her ashore, whereby the goods were destroyed.[2] (3) Where a ship laden with a cargo of corn was forced by stress of weather into Elly harbor, the people came on board, took the control of the ship from the captain, drove the vessel aground and would not leave her until they had compelled the captain to sell the corn to them at a very low price.[3]

§ 292. It has been seen that carriers are not at common law liable for loss or damage caused by the "public enemy." It is, however, customary and, in order to avoid dispute, advisable, that it should be made one of the expressed exemptions from liability written in the bill of lading. What are losses by the public enemy? The term "the public enemy," or its equivalents, "the king's enemies," "the queen's enemies," "the enemies of the state," and similar expressions, is to be defined as including all those with whom the State is at open war.[4] It has been repeatedly said that pirates are within this definition, inasmuch as they are universally treated as the enemies of all mankind.[5] Privateers are likewise and for evident reasons, within the exception.[6] It has been also held by the Federal Supreme Court that hostile tribes of Indians may be so regarded.[7] The exception, moreover, includes not only the enemies of the country in

[1] Dixon *v.* Reed, 5 B. & Ald. 597.

[2] Palmer *v.* Naylor, 23 L. J. Ex. 323.

[3] Nesbitt *v.* Lushington, 4 T. R. 783. In both of the two cases last named the question came up, to which of two causes of loss,—dangers of the sea and piracy, both of which unquestionably contributed to the destruction of the goods,—was the loss to be attributed and in both cases, by applying the doctrine of the proximate cause already considered, it was found that the loss was primarily due to piracy, and was within the exception.

[4] Story on Bailments, § 526; Angell on Carriers, § 200.

[5] Story on Bailments, § 526; Gage *v.* Tirrell, 9 Allen (Mass.), 299; Pickering *v.* Barkley, Styles, 132 (24 Car.); Barton *v.* Wolleford, Comb. 56 (3 Jac. II.).

[6] Schouler on Bailments, § 408.

[7] Holladay *v.* Kennard, 12 Wall. 254.

which the Court is situated, but also the enemies of the sovereign or State of the carrier.[1] Thus, where a Mecklenburg ship loaded at Odessa to call at Cork or Falmouth for orders, proceeded to Falmouth and was there ordered to Limerick to discharge; but the master was prevented from doing so by the act of the enemies of his sovereign the Duke of Mecklenburg-Schwerin, it was held that such an event was contemplated by the expression, "the king's enemies."[2]

§ 293. To follow the definition yet farther. When and with whom is the State at open war? The Constitution of the United States gives the authority to declare war and deal with the public enemies of the United States to the executive and legislative branches of the Federal Government. The Courts of the Union must view belligerents in the same way. With abundant reason, therefore, the Confederate insurgents, with whom the Federal Government waged war, have been called "public enemies" and carriers have been freed from liability for loss at their hands.[3] It would seem that within the limits of the Confederacy the Confederate army was not to be so considered,[4] while on the other hand, the Federal troops were public enemies as to those within the Confederate lines and their act excused a carrier within those lines for the loss of goods taken by them.[5]

§ 294. The following have been held not to be losses by the public enemy: The damage or loss of goods by a mob, however

[1] The Patria, 3 L. R., Adm. 436; S. C., 1 Asp. Mar. Law Cas. 71; The Teutonia, 3 L. R., Adm., 394; S. C. 24 L. J. (N. S.) 21; 1 Asp. Mar. Law Cas. 32; The Heinrich, 3 L. R., Adm. 424; The Wilhelm Schmidt, 25 L. T. (N. S.) 34.

[2] Russell *v.* Niemann, 34 L. J., C. P. 10; S. C., 10 L. T. 786; 13 W. R. 93.

[3] Salisbury *v.* Harnden Express Co., 10 R. I. 244; Hubbard *v.* Same, ib. 251; Smith *v.* Brazelton, 1 Heisk. (Tenn.) 44; Lewis *v.* Ludwick, 6 Colder (Tenn.), 368; McCranie *v.* Wood, 24 La. Ann. Rep. 406; Bland *v.* Adams Express Co., 1 Duv. (Ky.) 232; Philadelphia, etc., R. Co. *v.* Harper, 29 Md. 330; Holladay *v.* Kennard, *supra;* Porcher *v.* Northeastern R. R. Co., 14 Rich (S. C.), 181; U. S. *v.* Palmer, 3 Wheaton, 610; Thorington *v.* Smith, 8 Wall. 1.

[4] N. & C. R. R. Co. *v.* Estis, 7 Heisk. (Tenn.) 622.

[5] Southern Ex. Co. *v.* Womack, 1 ib. 256.

numerous;[1] by thieves or robbers,[2] or by embezzlement,[3] or by rioters or insurgents,[4] is not within the exception. In the much-quoted language of Lord HOLT, "Though the force be never so great, as if an irresistible multitude of persons rob him, the carrier is nevertheless chargeable."[5] When the riot assumes the character of a civil war it comes within the exception, but until then the mere fact that the carrier was overpowered, does not affect the question of his liability.[6]

The opinion of KENYON, C. J., in Edwards *v.* Sherral, is not opposed to this view of the law, though the carrier was held to be discharged. During the bread riots at Wolverhampton, the plaintiff, having a quantity of corn which the mob was threatening to seize, stopped a boat belonging to the defendants which happened to be passing the town and without informing the captain of the true state of affairs, induced him to take the corn on board. The corn was seized by the rioters. It was held by the court that though the carrier would ordinarily be held for the loss, the contract was so tinged with fraud that in this case he should not be held to a strict common-law liability.[7] Robbery on a river where the tide ebbs and flows is not a loss within the exception of the "public enemy," even though an Act of Congress may have provided that such robbery shall be deemed piracy[8] and a seizure of goods by an officer and sol-

[1] Morse *v.* Stm. T. Raymond, 220 (24 Car. II.); 1 Vent. 190, 238; 2 Lco. 69; 1 Mod. 85; 2 Keb. 866; 3 ib. 72, 112, 135; Barclay, *v.* Cuculla, 3 Doug. 389; Trent, etc., S. Nav. Co. *v.* Wood, 3 Esp. 127; S. C., 4 Doug. 287; Story on Bailments, § 526; Angell on Carriers, § 200.

[2] 1 Inst. 89 a; Wooleip & Curties, 1 Roll's Abr. 2; Actions sur Case, c. pl. 4; Sutton *v.* Mitchell, 1 T. R. 18; Kemp *v.* Coughtry, 11 Johns. (N. Y.) 107; Hall *v.* Cheney, 36 N. H. 26.

[3] Tenterden on Shipping, Pt. III., ch. iii., § 9, p. 244 (5th ed.); Roccus (de nav. et naut., 40); Dale *v.* Hall, 1 Wils. R. 281; Smith *v.* Shepherd, Abb. on Shipping, pp. 235, 287, 291, ch. iv., § 2 (10th ed.); Lewis *v.* Ludwick, 6 Colder (Tenn.), 368; Watkinson *v.* Laughton, 8 Johns. (N. Y.) 213; Schieffelin *v.* Harvey, 6 ib. 170.

[4] Forward *v.* Pittard, 1 T. R. 27; Pittsburgh, etc., R. R. Co. *v.* Hollowell, 65 Ind. 188; Boon *v.* The Belfast, 40 Ala. 184; N. & C. R. R. Co. *v.* Estes, *supra*.

[5] Coggs *v.* Bernard, 2 Ld. Raymond, 909.

[6] Cases cited above.

[7] 1 East, 604.

[8] The Belfast *v.* Boon, 41 Ala. 50.

diers of the United States army, though unjustly made, is also not within the exception.[1]

§ 295. The exemption under consideration will not avail a carrier who has been guilty of negligence.[2] If the public enemy, for example, remove the goods from the cars of a railroad carrier and desert them, it is the carrier's duty to take such care of the goods thereafter as, under the circumstances, is reasonable, necessary and practicable, and failing to do so he is liable to the owner for the loss.[3] The courts have found negligence in the following: Needless delay;[4] reshipment by the carrier without authority;[5] the taking of the one of two routes which exposes the goods to the greater risk of capture;[6] collusion with the enemy or allowing the goods to be taken before the carrier is menaced;[7] the neglect to provide for an especially hazardous journey an express agent who is cool, self-possessed and prudent.[8]

§ 296. The loss, however, must follow as the natural and proximate result from the negligent act or omission. The mere fact of negligence will not of itself render the carrier liable if the loss is in fact due solely to the public enemy.[9] Similar to this is the rule where two causes of disaster have contributed to bring about a loss. In such a case the proximate cause of loss is the one to which it is to be ascribed. Thus a tempest may carry a ship upon the enemy's coast, the act of God thus enabling the enemy to capture the ship. Shall the loss here be attributed to the act of God or to the public enemy? The distinction seems to be clear. If the vessel was wrecked and the property inevitably lost before falling into the enemy's

[1] Seligman *v.* Armijo, 1 New Mexico, 459.

[2] Forward *v.* Pittard, *supra;* Amies *v.* Stevens, 4 Strange, 128; Lawson on Contracts of Carriers, § 13.

[3] Wallace *v.* Sanders, 50 Ga. 134; Philadelphia, etc., R. R. Co. *v.* Harper, 29 Md. 330; Spaids *v.* N. Y. Mail S. S. Co., 3 Daly (N. Y.), 139.

[4] Clark *v.* Pacific R. R. Co., 39 Mo. 184.

[5] G. & B. R. Nav. Co. *v.* Marshall, 48 Ind. 596.

[6] Express Co. *v.* Kountze, 8 Wall. 342.

[7] James *v.* Greenwood, 20 La. Ann. Rep. 297. Collusion, however, will not be presumed. Britton *v.* Aymar, 23 ib. 63.

[8] Holladay *v.* Kennard, 12 Wall. 254.

[9] Clark *v.* Pacific R. R. Co., 39 Mo. 184.

hands, the loss is to be attributed to the former cause, but to the latter if the goods would have been safe had the vessel been driven upon any other coast.

In Hahn *v.* Corbett[1] the vessel had been stranded off the coast of South America and was lost. The goods were seized by command of the governor of the place and confiscated. BEST, C. J., held that this was a peril of the seas, for "the goods were lost when the ship was lost and what happened afterwards makes no difference in this case." On the other hand, in Green *v.* Elmslie,[2] a ship, when off the coast of France, was blown ashore by the wind and while as yet unharmed was captured by the enemy. Lord KENYON held this to be loss by the king's enemies.

These distinctions are sometimes of importance, as where under the terms of the bill of lading, as is not infrequent, it is agreed that the carrier shall insure against certain classes of loss and that the shipper shall not hold him responsible for others.[3]

§ 297. An outbreak of hostilities or a declaration of war between the state of the carrier and the country of destination may operate as a defence within this exception. Such an event, in some instances, will render the contract of the bill of lading absolutely void and in others it will simply operate to justify delay or deviation. If, by it, the voyage is broken up, or the completion of it becomes unlawful, or if the nature of the cargo is such that it cannot endure delay, the contract is dissolved.[4] This is the effect of a hostile blockade of the port of destination.[5] If, however, the performance is simply delayed by the hostilities, the carrier may detain the goods until he can safely proceed upon the voyage and he cannot be held liable for such delay.[6] Such is usually the effect of a blockade of the port of departure.[7]

The carrier will, nevertheless, be liable if the delay is really due to his servant's misconduct rather than to the war. The

[1] 2 Bing. 205.

[2] Peake N. P. 278 (34 Geo. III.).

[3] Story on Bailments, § 526; King *v.* Shepherd, 3 Story's C. C. Rep. 349; Porcher *v.* N. E. R. R. Co., 14 Rich. S. C. 181; Spaids *v.* N. Y. Mail S. S. Co., 3 Daly (N. Y.), 139.

[4] Brown *v.* Delano, 12 Mass. 373; Abbot on Shipping (7th Am. ed.), *p. 596, note, and cases cited.

[5] Scott *v.* Libby, 2 Johnson (N. Y.), 336; Stoughton *v.* Rappalo, 3 S. & R. (Pa.) 559.

[6] Abbot on Shipping, *supra.*

[7] Palmer *v.* Lorillard, 16 Johnson (N. Y.), 348; Ogden *v.* Barker, 18. ib. 87.

plaintiff's agent in Bordeaux shipped goods on the defendants' ship to be delivered at New Orleans. A British privateer was cruising beyond St. Thomas and the captain, fearing capture, stopped at St. Thomas and sold the goods. The plaintiff sued for the amount he would have received at New Orleans if the goods had been delivered according to the bill of lading. It was held that the captain's conduct was not justifiable and that the defendants were liable.[1]

§ 298. A stipulation that the carrier shall not be liable for "loss by rats" is customarily added to the modern bill of lading, it having been repeatedly decided by the courts that damage by rats does not fall within the meaning of the phrase "perils of the sea."[2] This would seem to be the reverse of the rulings of the civil law on the subject.[3]

A usage or custom cannot be introduced to prove that such a loss is to be considered a peril of the sea.[4]

In Aymar *v.* Astor[5] it was said: "The true question to be submitted to the jury was whether the master had used ordinary care and diligence. Whether a cat is a sufficient precaution against rats, or whether smoking the vessel is the proper and more efficacious remedy, is a proper subject for the consideration of the jury. Formerly, taking a cat on board was accounted ordinary diligence and excused from damages. If subsequent experience has shown a better remedy it is the duty of masters and owners to adopt it." This is perhaps a more nearly correct statement of the law than that of Mr. Justice STORY in his treatise on Bailments: "If the master has used all reasonable precautions to prevent such a loss, as by having a cat on board, it is by the general consent of the writers upon

[1] St. Marc *v.* La Chapella, 1 Martin's La. Rep. 36.

[2] Dale *v.* Hall, 1 Wils. 281; Hunter *v.* Potts, 4 Camp. 203; Laremie *v.* Drury, 8 Exch. 166; The Barque Carlotta, 3 Asp. Mar. Law Ca. (N. S.) 456; also in 9 Benediet Rep. 1; 3 Kent's Comm. 300. In Kay *v.* Wheeler, L. R., 2 C. P. 302, the bill excepted "the act of God, the queen's enemies, fire, and all and every other dangers and accidents of the sea, rivers, and navigation of what kind and nature soever." *Held*, that loss by rats was not within these exceptions.

[3] Emerig. Assecur, 377, 378; Roccus de Navi, n. 58; Roccus de Assecur, n. 49.

[4] Aymar *v.* Astor, 6 Cowen (N. Y.), 267.

[5] Ib.

foreign maritime law held to be a loss by the peril of the sea or inevitable accident."[1] This view of the law has been criticised by Chief Baron Pollock, in Laremie *v.* Drury.[2]

In Stevens *v.* Navigazione Generale Italiana,[3] the bill of lading exempted the ship from liability for "damage done by vermin." The court held that the exception did not release the ship from liability for negligence in failing to fumigate and drive out rats.

§ 299. A "loss by vermin" is not within the exception perils of the sea. In "The Miletus"[4] it was shown that the labels on an invoice of chests of tea had been eaten by cockroaches, thus occasioning loss to the shippers. The court held that this was not the result of a peril of the sea or of any of the dangers and accidents of navigation. There are numerous cases on the books to the effect that the destruction of the bottom of a vessel by worms is not a peril of the sea,[5] but the rule is different where the damage is caused by sea-water escaping through a hole made by rats. Thus in the recent English case of Hamilton *v.* Pandorf[6] rice was shipped under a bill of lading which excepted "dangers and accidents of the seas." During the voyage rats gnawed a hole in a pipe on board the ship, by which sea-water escaped and damaged the rice. It did not appear that there was negligence or default on the part of the owners of the ship or their servants. The House of Lords decided that the damage was within the exception and that the ship-owners were not liable.

[1] Abbot on Shipping, Pt. 3, Ch. 3, § 9 (5th ed.). This view of the law is taken in Garrignes *v.* Cone, 1 Binney (Pa.), 592.

[2] *Supra.* In The Bark Carlotta, 3 Asp. Nav. Law Ca. (N. S.), 456, even the fact that the ship had been fumigated does not seem to have brought the damage within the perils of the sea.

[3] 39 Fed. Rep. 562.

[4] 5 Blatch. C. C. 335.

[5] Rohl *v.* Parr, 1 Esp. 444 (36 Geo. II.), opinion by Lord Kenyon; Martin *v.* Salem Marine Insurance Co., 2 Mass. 420; Phillips on Insurance, § 1101, vol. I. This is certainly the law where the ship has been sailing in an ocean where worms ordinarily assail and enter the bottom of vessels. Hazard *v.* New England Marine Insurance Co., 1 Sumner, 218. In Depeyster *v.* Columbian Ins. Co., 2 Caines, 85, Livingston, J., commenting on Rohl *v.* Parr, said: "I do not by anything that has been said mean to be understood as subscribing to the nisi prius opinion of Lord Kenyon. . . . . It is not necessary to decide this question now."

[6] L. R. 12 App. Cases, 518.

CHAPTER XXI.

EXCEPTIONS CONTINUED—RESTRAINT BY LEGAL PROCEDURE—RESTRAINT OF PRINCES—OF PEOPLE.

"Restraint by legal procedure," necessity for the exception, § 300.
Obligations of the carrier when legal seizure is made, § 301.
Opinion in the case of Stiles *v.* Davis, § 302.
Conflicting opinion in Massachusetts, § 303.
Definition of exception "restraint of princes," § 304.
Seizure for violation of customs laws within the exception, § 305.
Embargo, blockade, and neutrality edicts generally within the exceptions, §§ 306, 307, 308.
Effect of damage by delay caused by quarantine regulations, § 309.
Restraint of princes and restraint of people practically synonymous terms, § 310.

§ 300. If the language of Finlay *v.* Liverpool, etc., Steamship Company[1] is authoritative, a stipulation exonerating the carrier from the restraints of courts of law or by legal procedure should be contained in the bill of lading. It may, however, well be doubted whether such a provision is altogether necessary to exempt the carrier from his liability where delivery is impossible because of a legal seizure of the goods. In very many cases the principle has been thus broadly stated: A carrier is not liable for goods taken out of his hands by legal process and when goods are attached in his hands he cannot give them up to the consignee while the attachment is pending and this, it appears, without regard to the provisions of the bill of lading.[2]

§ 301. When such a seizure is made, however, the carrier must assure himself that the proceedings are regular and

[1] 23 L. T. N. S. Exch. 251.

[2] Stiles *v.* Davis, 1 Black, 101; Bliven *v.* Hudson, etc., R. R. Co., 36 N. Y. 403; Same *v.* Same, 35 Barb. 188; Van Winkle *v.* U. S. Mail Co., 37 ib. 122; Burton *v.* Wilkinson, 18 Vt. 186; Ohio, etc., R. R. Co. *v.* Tohe, 51 Ind. 181; Angell on Carriers, § 337 a.

valid.[1] He must immediately notify the consignor of the fact of the seizure,[2] but beyond he is bound neither to litigate for his bailor, nor to show that the decision of the court issuing the process is correct in law or fact, nor to assert the title of the bailor, nor to follow the goods.[3]

In a Massachusetts case, where the action was for the non-delivery of a quantity of spirituous liquors and the carrier alleged that the goods had been taken out of his hands by a constable upon a writ of attachment, the court held that, inasmuch as spirituous liquors could not be legally sold under execution according to the existing laws of the commonwealth, the attachment was void and the officer a trespasser. The carrier was held liable.[4]

§ 302. This case is not easily reconcilable with the ruling of the Supreme Court of the United States in Stiles *v.* Davis.[5] This was an action of trover for the loss of goods delivered to the carrier. The defendant showed that the goods had been purchased by the consignor from the assignee of an insolvent firm and while in transit had been seized under an attachment sued out by creditors of the former owners as property of the insolvent firm. Mr. Justice Nelson, in delivering the opinion of the court, held that the right of the officer to hold the goods could be determined only by the court having jurisdiction in the attachment suit; that the fact that the goods were seized under an attachment against third persons did not impair the legal effect of the seizure and custody of the goods under it so as to justify the defendant in taking them out of the hands of the sheriff, and that the plaintiff's remedy was not against the carrier, but against the officer who had wrongfully seized them, or against the plaintiff in the attachment suit if he directed the seizure.

§ 303. Another Massachusetts case is even more directly in conflict with the doctrine of Stiles *v.* Davis. In Edwards *v.*

[1] Bliven *v.* Hudson, etc., R. R. Co., 35 Barb. 188.

[2] Scrantom *v.* Farmers' Bank, 24 N. Y. 424 and cases cited *supra.*

[3] Bliven *v.* Hudson, etc., R. R. Co., 35 Barb. 188; Ohio, etc., R. R. Co. *v.* Tohe, *supra;* The Onrust, 1 Ben. 431.

[4] Kiff *v.* Old Colony, etc., R. R. Co., 117 Mass. 591.

[5] 1 Black, 101.

White Line Transit Company[1] the facts were substantially the same as in that case, the goods in transit having been attached as the property of a third person. The suit was here brought on the carrier's contract to deliver the goods and it was held that the facts of the case presented no grounds for the relief of the carrier. The Federal case is thus distinguished: "In Stiles *v.* Davis, the action was not brought upon the contract of carriage; nor for a violation by the defendant, of his obligations as carrier. It was an action of trover for the conversion of the goods. The failure to deliver the goods at another place than that of their destination upon a demand made there, with no denial of the plaintiff's right, but merely for the reason that they were detained under attachment by legal process, would not be a conversion of the property. The case decides nothing more. The question whether the same facts would constitute a good defence to a suit against the defendant for breach of his contract or obligation as common carrier, was not decided and was not raised by the form of the action. The opinion by Mr. Justice Nelson does indeed assign as a reason for the decision that the goods 'were in the custody of the law, and the defendant could not comply with the demand of the plaintiffs without a breach of it;' that 'the right of the sheriff to hold them was a question of law to be determined by the proper legal proceedings and not at the will of the defendants nor that of the plaintiffs.' But this language must be interpreted with reference to the precise question then under consideration. In one sense the property was in the custody of the law, so far, at least, that the surrender of its possession to the officer claiming to attach it upon legal process was not tortious on the part of the carrier so as to subject him to the charge of converting it to his own use. But that custody was of no effect against any one having an interest in the property not made party to the suit in which the process issued. It was not in the custody of the law in the sense in which property that is the subject of proceedings *in rem* is in the custody of the law or property actually belonging to the party against whom the suit is brought. In personal actions, the attachment

[1] 104 Mass., 159.

of property of another than a defendant in the suit is a trespass; and, as to the true owner, the property is not regarded as in the custody of the law. . . . .

"As against the plaintiffs it was no more validity than a trespass by any other unauthorized proceeding, or by any unofficial person. The carrier is not relieved from the fulfilment of his contract, or his liability as carrier, by the intervention of such an act of dispossession any more than he is by destruction from fire or loss by theft, robbery, or unavoidable accident. In neither case is he liable in trover for conversion of the property; but he is liable on his contract or upon his obligations as common carrier."

§ 304. In Finlay *v.* Liverpool, etc., Steamship Company,[1] the exception "restraint of princes" is defined as the forcible interference of the state or government of a country, taking possession of the goods *manu forti*. It does not, it was there said, extend to legal procedure in the courts, nor in an action founded on a contract can the act of a court of law deciding that the carrier shall hold the goods to the order of the true owner, relieve him from performing his contract, unless such act or decision has been expressly excepted in the bill of lading. Such was the language of the court in this case with reference to one of the pleas of the defendants, but another plea setting up that the goods were not the property of the shippers and that they had had no right to ship them, and that they had fraudulently "endorsed the bill of lading for them to the plaintiffs and that the master had been compelled by the decision of the Supreme Court of New York to deliver said goods to the order of the true owner," was held to be good, since it denied the plaintiffs' title to the goods.[2]

§ 305. Seizure or confiscation of goods for the unintentional violation of the customs laws of a country is probably within the exception.[3] It has been expressly held that these are not, however, within the scope of such other exceptions as the "act

[1] 23 L. T. N. S. Exch. 251.

[2] The phrase "restraint of princes, etc., upon the voyage" does not apply until the vessel has set sail from the port of departure. Crow *v.* Falk, 8 A. & E. N. S. 467.

[3] This seems to be implied in the cases hereafter cited.

of God," "the public enemy," "perils of the sea," and "dangers of navigation," nor will the fact that the taking was against the will and without the default of the carrier serve to exonerate him if protected only by the foregoing exceptions.[1] In Howland *v.* Greenway[2] the master appears to have consulted the Brazilian consul at New York, before setting sail for Rio de Janeiro, as to the Brazilian customs laws, and acting upon the information thus given him to have neglected to enter upon his manifest certain goods, which were accordingly seized and confiscated. The bill of lading contained the clause "perils of the sea," and the fact that the master acted in good faith and without design to defraud was not questioned. The carrier was nevertheless held liable.

§ 306. Embargo, blockade and neutrality edicts and laws may come within the exception under consideration.[3] The restraint contemplated by the phrase, however, must be actual and operative and not merely expected or contingent.[4] Said Lord Ellenborough, in Atkinson *v.* Ritchie:[5] "Such a state of circumstances must be shown as that the contract is no longer capable of being performed without a criminal compromise of public duty." So where an English vessel left St. Petersburg upon a general rumor of a hostile embargo being laid on British ships by the Russian government, it was held that this did not justify a breach of contract by the master, though he acted in good faith and under a reasonable and well-grounded apprehension.[6] The mere information by a belligerent to a neutral vessel of a blockade is said in a Massachusetts case not to be a restraint,[7] and in Evans *v.* Hutton,[8] where the action was as-

[1] Spence *v.* Chadwick, 10 A. & E. N. S. 516; Howland *v.* Greenway, 22 How. 491; Gosling *v.* Higgins, 1 Camp. 451.

[2] 22 How. 491.

[3] Geipel *v.* Smith, L. R. 7 Q. B. 404; Atkinson *v.* Ritchie, 10 East, 530; Sjoerds *v.* Luscombe, 16 ib. 201; Blight *v.* Page, note to 3 B. & P. 295 and cases following.

[4] From the analogies it cannot well be doubted that a reasonable and proper delay or deviation is under this exception permissible. See The Express, L. R. 3 Adm. & Ecc. 597; The Teutonia, ib. 394; S. C. on appeal, L. R. 4 P. C. 471; Esposito *v.* Bomden, L. J. 27 Q. B. 17.

[5] 10 East, 530.

[6] Atkinson *v.* Ritchie, ib.

[7] Richardson *v.* Maine, etc., Ins. Co., 6 Mass. 102.

[8] 4 M. & G. 954.

sumpsit upon the undertaking to carry goods in defendant's ship to Canton, and the plea set up that one Elliot being superintendent of the trade of Her Majesty's subjects to and from China, and one Smith then being captain of Her Majesty's ship The Volage, did, for divers good, sufficient and lawful reasons and not for any wrongful, negligent, unlawful or improper act or behavior on the part of the defendants, forcibly interrupt the said ship from further proceeding on its said voyage to Canton and did prohibit, prevent and discharge the said ship from proceeding to Canton, etc. It was held on special demurrer that this plea was bad for not sufficiently disclosing that Captains Elliot and Smith, as chief superintendent and commander of the naval forces in the China Seas respectively, had authority to act in the manner alleged.

§ 307. In Geipel *v.* Smith[1] it was shown that by charter-party it was agreed that defendant's vessel should load with coals and should then proceed to Hamburg and there deliver the same, restraint of princes and of rulers being, *inter alia*, excepted. The pleas set up that, before there had been any breach of the charter-party, a war had broken out between France and Germany and that the port of Hamburg was blockaded by a French fleet; that the Queen of England had enjoined a strict neutrality on the part of her subjects; that the performance of the charter-party became thus illegal, and that the defendants, as they lawfully might, refused to carry out the same. The court held that the pleas disclosed substantially a good defence, for that the charter-party, being for one single adventure to commence at once and the contract being still executory, the defendants were justified in throwing up the contract and refusing to load the ship when the further performance of the contract within a reasonable time was prevented by an excepted clause, to wit, the blockade which was a "restraint of princes."

§ 308. A series of early cases decides that the exception restraint of princes or rulers in a charter-party does not operate for the benefit of any one but the owners of the ship, unless it be expressly stipulated that the benefit of the exception shall be mutual, and if a merchant hire a ship to go to a foreign

[1] L. R. 7 Q. B. 404.

port and covenant there to furnish a cargo, an embargo or prohibition on the part of the foreign government forbidding the export of the intended cargo does not dissolve the contract so far as the shipper's liability under it is concerned.[1]

§ 309. In the case of The Bohemia[2] there was in the bill of lading an exception for damage or decay caused by delay from "restraint of princes, rulers, or people." The steamer was delayed at quarantine for fourteen days and the potatoes which she had on board were spoiled by the delay. The court held that the ship was not liable for the damage.

§ 310. The meaning of the phrase "restraint of people" differs in no material way from that of "restraint of princes." The word "people" in this sense means the supreme power of the country, whatever it may be. Hence where a mob or a multitude of people seize a vessel and compel the master to sell the cargo, this, though an act of piracy, does not come within the exception under consideration.[3]

[1] Sjoerds *v.* Luscombe, 16 East, 201; Blight *v.* Page, note to 3 B. & P. 295; Touteng *v.* Hubbard, 3 B. & P. 293; Bruce *v.* Nicolopulo, 24 L. J. Ex. 321.

Mr. Leggett gives the converse of this proposition in these words: "If the government of the country to which a ship and cargo belong should prohibit the exportation or importation of the particular commodities that compose the cargo, or by the terms of the contract are destined to compose it, performance being thus rendered illegal by an authority to which both parties owe allegiance, damages for non-performance cannot be claimed by either." Leggett on Bills of Lading, p. 171.

[2] 38 Fed. Rep. 756.

[3] Nesbitt *v.* Lushington, 4 T. R. 783.

CHAPTER XXII.

EXCEPTIONS CONTINUED — "RIOTS, STRIKES, AND STOPPAGES OF LABOR" — "RISK OF BOATS" — "AT SHIP'S RISK" — "ROBBERS AND THIEVES" — "RUST" — "SWEAT."

"Riots, strikes and stoppages of labor," generally, § 311.
Exception not always necessary to be inserted in the bill, § 312.
Delay caused by a strike, § 313.
Delay caused by an armed mob, §§ 314, 315.
Decisions of Federal Courts in regard to strikes, § 316.
"Risk of boats," § 317.
"At ship's risk," § 318.
"Robbers and thieves," §§ 319, 320.
"Rust," § 321.
"Sweat," § 322.

§ 311. THE exception "riots, strikes and stoppages of labor" is of such recent addition to the forms of bills of lading in common use that as yet it lacks authoritative construction. It has been added for the evident purpose of avoiding responsibility on the carrier's part for damage or delay to goods in transit during periods of public disturbance and particularly during labor riots, such as have in recent years been of frequent occurrence. That the common law exception, "the king's enemies," did not include the damage done by rioters is clear.[1]

§ 312. It does not necessarily follow from this, however, that a carrier is to be held liable for damages of this sort, unless the exception occurs in his bill of lading. The law appears to be quite otherwise. The first American case of a strike being pleaded in a suit on the carrier's contract is Blackstock *v.* New York and Erie R. R. Co.,[2] decided in 1859. The action was brought for a delay in the carriage of a large quantity of potatoes from Hornellsville to New York and it was shown that of one hundred and sixty-eight engineers in the employ of the railroad company, one hundred and forty had suddenly and together abandoned their engines, for the purpose of compelling

[1] Section on "the public enemy." [2] 20 N. Y. 48.

the company to rescind a regulation which the court considered proper and reasonable. It did not appear that the higher officers of the company were at all in fault. It was nevertheless held that the corporation was liable. Mr. Justice Denio, in delivering the opinion of the court, said: "I cannot see anything in the circumstances of the defendants to take the case out of the rule" (*respondeat superior*). "Being a corporation, all their business must necessarily be conducted by agents and if they are not liable for their acts and omissions, parties dealing with them have no remedy at all. A railroad company is no doubt peculiarly exposed to loss from the misconduct of its engineers and in the present case it does not appear that the slightest blame can attach to any of the superior officers of the company. . . . Still, this, we have seen, cannot avail them as a defence."

§ 313. It follows, therefore, that the carrier is liable for the delay occasioned by a strike of its employés, as well as for their other wrongful acts and negligence.[1] This doctrine is announced in a more recent case in Missouri,[2] where it was held that the mere proof of the existence of a strike does not relieve the carrier from his liability for delay. The language of the court is explicit: "We think the court (below) declared the law correctly in requiring that in order to amount to an excuse for the delay, the obstructions to the running of trains should have been the work of persons other than the employés or servants of the road. A company will be held responsible for damages resulting from a delay to transport freight in the usual time, when it is caused by its servants suddenly and wilfully refusing to work. Because the employés refuse to work or perform their usual employment, it will not release the company or the carrier from the responsibility of his contract. It may be his misfortune, but third persons are not to suffer

[1] "He is liable for a delay caused by . . . . the negligence or wrongful acts of his agents and servants, as where . . . . the transportation is delayed by a strike among the engineers of the road." Edwards on Bailments, § 609. See Weed *v.* Panama R. R. Co. (17 N. Y. 362), where the delay was by the wrongful act of only one man, the conductor; but the carrier was held liable.

[2] Read *v.* St. Louis, Kansas City, and Northern R. R. Co., 60 Mo. 199.

thereby. His liability is all the same, whether he could get others to supply their places or not."

§ 314. Farther on the court suggest a distinction, which is followed in the latter case in these words: "If the trains were delayed or interrupted by an armed mob, over which the defendant had no control, that might afford an excuse, provided reasonable care and diligence were used by the defendant; but for the acts, omissions and wrongs of its servants, it was liable over to the plaintiff."[1]

In Pittsburgh, Ft. Wayne, and Chicago R. R. Co. *v.* Hazen,[2] the following facts appeared in the court below: Hazen had shipped cheese from Chicago to New York on December 10th. It was delivered to the consignees on the 28th day of December in a frozen condition. The usual period of transit did not exceed twelve days. The weather from the 10th to the 23d of December was not severe, but the severe cold had occurred between the 23d and the 28th. The railroad company offered to show that the sole cause of delay was the obstruction of the passage of trains in the neighborhood of Leavitsburg, resulting from the irresistible violence of a large number of lawless men, some of whom had been previously employed by the railroad company, but had been discharged. This evidence had been rejected by the court. This was held to be error, in these words: "The proof offered tends to show that the delay was caused by the lawless and irresistible violence of the discharged brakemen and others acting with them. These men, at the time of this lawlessness, were no longer employés of the company. The case supposed is not distinguishable in principle from the assault of a mob of strangers." Farther on it is said: "For delay resulting solely from the lawless violence of men not in the employment of the company, the company is not responsible, even though the men whose violence caused the delay had, but a short time before, been employed by the company."[3]

§ 315. Again, in an Indiana case,[4] in an action for loss by

[1] Page 208.

[2] 84 Ill. 36.

[3] To this Walker, Craig, and Scholfield, JJ., dissent.

[4] Pittsburgh, Cincinnati, and St. Louis R. R. Co. *v.* Hallowell, 65 Ind. 188.

delay in the carriage of live stock, the defendant set up in his answer "that such delay was not caused by defendant or its agents, but solely by reason of the fact that, though the defendant was prepared to receive and carry the goods, an armed multitude, against the laws of the State, which neither the defendant nor the civil authorities were able to control, by force and arms drove away the engineers and firemen operating defendant's cars and thus prevented the forwarding of plaintiff's goods." This was held on demurrer to be a sufficient answer. The question whether the strikers were or were not in the employ of the company, was somewhat summarily disposed of. The replication of the plaintiff, while claiming that the alleged insurrection was composed solely of the employés of the defendant, had set forth that on account of an unjust reduction of wages these "had refused to continue in the defendant's employ." This was held by a majority of the court to be insufficient as a reply, since it admitted the fact that the rioters were not in the company's service; but one of the judges dissented, holding that this reply was sufficient and that it raised a question of fact which should be submitted to a jury, namely, whether the rioters were or were not employés of the defendant.[1] This case is affirmed in a yet more recent case in the same State[2] and the law has again been similarly stated by the Supreme Court of Illinois.[3]

§ 316. Two cases of loss by strikes have come before the Circuit Courts of the United States. In Wertheimer *v.* Pennsylvania R. R. Co.,[4] the bill of lading provided that the carrier was not to be liable for "loss or damage by fire, unless it could be shown that such loss or damage occurred through the negligence or default of the agents of the company." On the arrival of the goods at Pittsburgh a mob seized upon the car containing

[1] Page 195.

[2] Lake Shore and Michigan Southern Ry. Co. *v.* Bennett, 89 Ind. 457. Here the question of the composition of the mob does not seem to have been closely inquired into. In fact, it appears that a part of the mob were the employés of the road, who had not been discharged, and who resumed work at the close of the strike. Page 468, p. 12.

[3] Indianapolis and St. Louis R. R. Co. *v.* Juntgen, 10 Ill. App. 295.

[4] 17 Blatch. 421; S. C. reported Lawson on Contracts of Carriers, p. 416.

the goods and ultimately set fire to and destroyed them. It was held that these facts did not prove negligence and that in the absence of such proof, the defendant was not liable. The goods for the loss of which suit was brought in Hall *v.* Pennsylvania R. R. Co.,[1] were destroyed at the same place and under the same circumstances. Here the bill of lading excepted "loss or damage on any article or property whatever by fire or other casualty while in transit or while in depots of places of transshipment," and the circuit Justice (McKenna) said, "Upon the whole, I am of opinion and so find, that the loss complained of was caused by fire while the plaintiff's goods were in transit by the defendant, within the meaning of the exception in the bill of lading; that the defendant is not shown to have been guilty of any negligence by which the efficiency of the exception is in any wise impaired, and hence that the plaintiff is not entitled to recover."

In a recent case in New York, it was decided that a common carrier by railroad which uses reasonable means to move its trains, is not liable for delay in forwarding goods caused by a riotous strike of its own employés.[2]

In the English case of Stephens *v.* Harris, where a claim was made for demurrage, it was held that the term "strike" must be used in the ordinary sense of strike against employers and that the abandonment of work by miners through fear of cholera is not within the exception "hands striking work" contained in a charter party.[3]

§ 317. The necessities of the trade in certain ports require that the goods be transferred from the vessel in which they have been carried and be landed in boats, barges, or lighters. The best opinion would seem to be that no greater liability exists when the goods are in such boats than when in the hold of the ship.[4] Nevertheless, the phrase "risk of boats" is sometimes added to the exceptions of the bill of lading.

In Johnston *v.* Benson,[5] the expression used was "risk of

[1] 14 Phila. 414; S. C. 37 Legal Intelligencer, 64; Lawson on Contracts of Carriers, p. 419.

[2] Little *v.* Fargo, 50 N. Y. Supm. Ct. 233.

[3] 56 L. J. Q. B. D., 516.

[4] Opinion of Burroughs, J., Johnston *v.* Benson, 4 Moore, 90; Leggett on Bills of Lading, p. 218.

[5] *Supra.*

boats so far as ships are liable thereto" and the loss was by the capsizing of shallop in conveying goods to the shore. It was held that the ship-owner was protected from such perils as were not within his control and that the loss in question was within the exception.

Mr. Leggett cites the following case decided in Calcutta. The bill of lading provided that the goods on arrival at their port of destination were to be delivered into the receiving ship to be landed at the consignee's expense, the ship-owner's liability ceasing as soon as they were delivered from the ship's tackle. When the goods arrived in port, the consignee had no boats ready to take delivery of his goods and they were put into other boats, one of which was swamped through the negligence of the boatmen and the goods in it were damaged. The ship-owner was held to be exonerated unless it had been shown that he had failed to take reasonable and proper care in the selection of the boats.[1]

§ 318. In Nottebohn *v.* Richter,[2] a vessel was to load a cargo from the shore by the ship's boat and crew, "at ship's risk." Part of the cargo was lost while on the boat and before it was loaded on the vessel, through one of the perils excepted by the charter party. The court held that the expression "at ship's risk" did not mean at the absolute risk of the ship-owners, but at such risk as would attach if the goods had been loaded on board.

§ 319. "Loss by robbery" was not included within the common law exceptions. Prior to the reign of Elizabeth, it would seem that the reverse was true; but in that commercial reign the doctrine of the common carrier's insurance of the goods carried was fully established and it was then said "if the carrier be robbed of the goods delivered to him, he shall answer for the value of them."[3] Exceptions such as these under consideration are therefore usually added to the bill of lading. They are, however, to be construed strictly and most favorably to the shipper.[4] The term "robbers" means loss by violence. Mere removal

[1] Bullock *v.* Toay Aung, 24 Cal. W. R. C. R. 74.

[2] L. R. 18, Q. B. D. 63.

[3] 1 Inst. 89, a; Mo. 462; 1 Ro. Abr. 2; cited Jones on Bailments, p. 103.

[4] Taylor *v.* Liverpool, etc., S. S. Co., 43 L. J. Q. B. 205.

without force is not within the meaning of the exception. Thus, where an action was brought to recover the value of a box of gold dust, forming part of a consignment from Panama to London, under a bill of lading excepting "robbers," the box having been secretly stolen from the railway truck between Southampton and London, it was held that the carrier was not relieved by the exception.[1] Where a carrier received a parcel ot notes to be carried from London to Dover, under a contract to deliver them next day, "fire and robbery" excepted and the parcel was deposited by the defendants in a desk in their office in London and was afterwards missing, it was held that this was not a loss within the exceptions of the contract.[2]

§ 320. There is a conflict of authority as to whether the term "thieves" is restricted to theft by parties who are not directly connected with the ship or will likewise exempt the carrier from liability on account of a theft committed by one of the crew or by a passenger. In Taylor *v.* Liverpool, etc., S. S. Co.,[3] diamonds were being conveyed from Liverpool to New York and were stolen from the ship either on the voyage or after her arrival in port. There was no evidence to show whether they were stolen by one of the crew, by a passenger, or by some person from the shore. The court was of opinion that as it did not appear that the theft was not committed by one of the crew, the carrier had failed to show that the loss came within the exception and was liable. In Spinetti *v.* Atlas S. S. Co.,[4] this case is disapproved. Here the facts tended to show that the loss was by the theft of the purser. The court carefully reviewed the ground taken by the English bench and held, two justices dissenting, that the theft was within the meaning of the exception. In both cases the reasons for the decisions rendered, were found in the cases defining similar expressions in policies of insurance. The weight of American authority would seem to sustain the view taken by the New York court.[5]

[1] De Rotschild *v.* Royal Mail Stm. Co., 21 L. J. Ex. 273; S. C. 7 Exch. 734; 14 Eng. L. & Eq. 327.

[2] Latham *v.* Staubury, 3 Stark. 143.

[3] 9 L. R. Q. B. C. 546; S. C. 43 L. J. Q. B. 205; 22 W. R. 752; 30 L. T. N. S. 714.

[4] 80 N. Y. 71; S. C. 14 Hun (N. Y.), 100.

[5] Atlantic Ins. Co. *v.* Storrow, 5

§ 321. The exception "rust" is frequently inserted in the bill. Like leakage and breakage it has reference to a direct injury to the goods. It will not cover an indirect injury to them from the rusting of other goods.[1] So, too, the exception is no protection where the rust is due to negligence or unskilfulness in stowing.[2] In "The Martha"[3] it was shown that iron was taken on board in dry weather, was not exposed to the access of water, but was well stowed, and that the ship came in tight and dry. It was held that this was not enough to relieve the carrier from responsibility for the rusting of the iron, but that he must show that the damage existed when the cargo was taken on board. Whether the bill of lading in this case contained the exception under consideration, does not appear. The exception does not cover loss by such chemical precipitates as are not properly rust and are not produced in the same way. Thus, iron bars were shipped at London for Calcutta and copperas was stowed in such close proximity to them that on arrival the bars appeared coated with a substance which analysis showed to be not ordinary rust, but sulphate of iron or copperas. It was here said that the loss was not occasioned by rust within the meaning of the exception, but by negligent stowage.[4] The mere fact of the existence in the cargo of an article likely to cause rust will not,

Paige (N. Y.), 285; American Ins. Co. *v.* Bryan, 1 Hill (N. Y.), 25; S. C. 26 Wend. (N. Y.) 563, in error; Parsons on Marine Insurance, ch. xvii. section v., and notes (cases cited).

In Schieffelin *v.* Harvey, 6 Johns. (N. Y.), 170, goods had been shipped from New York to London. On arrival it was found that the goods could not be landed because of the law, and the consignees agreed with the master of the ship that the goods should remain on board and be returned to the shippers at their (the shippers') risk, and an indorsement to that effect was made upon the bill of lading. The goods were stolen or embezzled probably by certain of the English custom-house officials. It was nevertheless held that the carrier was liable for the loss.

Where money is stolen from a carrier, under such a state of affairs as will exonerate him from liability for the loss, the carrier will nevertheless be answerable for the money in *indebitatus assumpsit*, if he has recovered it from the thief.

St. John *v.* Express Co., 1 Woods's C. C. Rep. 612.

[1] Thrift *v.* Youle, *supra*.

[2] Dedekaur *v.* Vose, 3 Blatch. 44; The Nith, 36 Fed. Rep. 383.

[3] Olcott's Adm. 140.

[4] Mackinnon *v.* Taylor, Com. Ca. 514.

however, defeat the exception. Where salt and iron had been carried at opposite ends of the same vessel, but no further alleged negligence on the part of the carrier was shown, the carrier was held to be discharged under a bill of lading which contained the exception.[1]

A case interesting in this connection is commented upon by the author of Contracts of Carriers.[2] The exceptions in the bill of lading included "leakage, breakage and rust." It was held that this would excuse rust caused by the sweat or moisture of the place where the goods were stowed, but would not excuse rust arising from the entrance of water through an insufficient ceiling in the hold, since this last could have been prevented by the exercise of proper care and diligence.

§ 322. By "sweat," or "sweating of the hold," is meant that damage done to goods in transit by the dampness which invariably, in greater or less degree, pervades ships. In Mendelsohn *v.* The Louisiana[3] the exception is construed. The Court said: "The evidence is entirely satisfactory to my mind that the damage was not caused by any carelessness or negligence of the master or seamen, but was caused by the sweating or humidity unavoidable in the hold of an iron ship loaded in Liverpool in the winter or early spring and making a voyage to New Orleans through the Gulf in the warm weather of spring. . . . . Such a cause of damage is within the exception —sweating." The Court proceeds to say, that such a loss is also within the exception, "perils of navigation." In other cases it has been repeatedly held that losses by sweating, if not unreasonable in amount and if unassociated with negligence on the carrier's part, are included within the general exception, "perils of the sea," and kindred phrases.[4] The question of

[1] Krohn *v.* Nurse, 5 Buch. (Cape of Good Hope) 85.

[2] Richards *v.* Hansen, Lawson on Contracts of Carriers, p. 401.

[3] 3 Woods's Rep. 46.

[4] Star of Hope, 17 Wallace, 651; McKinlay *v.* Morrish, 21 Howard, 343; Clark *v.* Barnwell, 12 ib. 272; Lamb *v.* Parkman, 1 Sprague, 343. In Baxter *v.* Leland, 1 Abbot Adm. 348, it is intimated that when sweating is the ordinary accompaniment of a voyage from southern to northern waters, and not the result of tempestuous weather, it does not fall under "perils of the sea." The court, however, do not seem to insist upon the distinction, inasmuch as in the case in

negligence usually arises in this connection upon the allegation of faulty stowage.[1] Thus, in Puturzo *v.* Compagnie Française, macaroni shipped under a bill of lading exempting from liability for damage from other goods by sweating or otherwise, was injured by the fumes of decaying fruit stowed near it in the same compartment. The Court held that the vessel was liable.

There are several cases in the books to the effect that proof that the stowage was according to the usage of the trade rebuts the presumption of negligence.[2]

hand they say that the carrier is to be held liable only so far as the damage is traceable to faulty stowage.

[1] The Star of Hope, *supra;* Baxter *v.* Leland, *supra;* The Keystone, 31 Fed. Rep. 412; The Maggie M., 30 ib. 692; 31 ib. 611.

[2] Lamb *v.* Parkman, *supra.*

CHAPTER XXIII.

BILLS OF LADING FOR THROUGH CARRIAGE.

Carriers may contract to carry beyond their own line, § 323.
Carriers other than the first, are agents of the latter, § 324.
The first carrier continues liable to final destination, § 325.
First carrier may, by contract, limit his liability to his own line, except for negligence, § 326.
Contract to carry beyond the carrier's own line may be expressed or implied, § 327.
The receipt of goods marked to be delivered beyond receiving carrier's own line, § 328.
Receipt of such goods by one of an association of carriers, § 329.
General statement of the rule, § 330.
What have been held to be "through" contracts, §§ 331, 332.
Effect of contract to "forward," § 333.
Duties of the carrier under such a bill, § 334.
Forwarder must follow shipper's instructions, § 335.
In the absence of instructions, carrier must forward by the usual conveyance, § 336.
Carrier contracting "to forward" is liable to the end of the route, unless otherwise stipulated, § 337.
Carrier cannot escape his liability by calling himself a "forwarder only," § 338.
Liability may, by contract, be limited to carrier's own line, §§ 339, 340.
The rule in England, § 341.

§ 323. A COMMON carrier is not by law obliged to carry goods beyond the terminus of his own line.[1] He may, however, bind himself by special contract not only to do this, but also to receive freight at points not upon his route.[2] The power to so contract, if not especially granted, is essential to his business and incidental thereto. No arrangement with a connecting line is necessary to such a contract.[3]

[1] B. & O. R. R. Co. *v.* Green, 25 Md. 72.

[2] Noyes *v.* R. & B. R. R. Co., 27 Vt. 110.

[3] Perkins *v.* P. S. & R. R. Co., 47 Me. 573; B. & P. S. B. Co. *v.* Brown, 4 P. F. Sm. (Pa.) 77; P. R. R. Co. *v.* Berry, 18 ib. 272; Wyman *v.* C. & A. R. R. Co., 4 Mo. App. Rep. 35; Schroeder *v.* H. R. R. R. Co., 5 Duer (N.Y. Supr. Ct.), 55; M. C. O. Co. *v.* H. St. J. R. R. Co., 35 Mo. 84; Wheeler *v.* S. F. & A. R. R. Co., 31 Cal. 46; Noyes *v.* R. & B. R. R.

§ 324. Where a carrier makes a through contract, the service done by the connecting carriers on the line is deemed to be done at his request and the latter act as his agents. Their acts are his acts and if there is a breach of the contract, the shipper has an action against him.[1] The carrier so undertaking is liable for the negligence of succeeding carriers on the line of transportation whom he employs, to the same extent that he is liable for that of his own immediate employés.[2] He has no authority to constitute another person or corporation the agent of his consignor or consignee, unless that power is given to him by the contract.[3] He may employ an agency, but it must be subordinate to him and not to the shipper, who neither employs it, pays it, nor has any right to interfere with it. Its acts become his acts, because done in his service and by his direction. Therefore, where an express company engaged to transport packages, etc., from one point to another, sends its messenger in charge of them on the car set apart for its use by the railroad company employed to perform the service, the latter company becomes the agent of the former.[4]

§ 325. The rule may then be stated, that when a carrier contracts to deliver to a point beyond his own terminus, his liability as a common carrier is not confined to his own line, but continues to final destination.[5] The carrier cannot free

Co., 27 Vt. 110; R. R. Co. *v.* Pratt, 22 Wall. 123; Bissell *v.* Michigan R. R. Co., 22 N. Y. 258; Cutts *v.* Brainerd, 42 Vt. 566; Buffett *v.* T. & B. R. R. Co., 40 N. Y. 168; Root *v.* G. W. Ry. Co., 45 ib. 524; Burtis *v.* B. & St. L. R. R. Co., 24 ib. 269; Hill Mfg. Co. *v.* B. & L. Ry. Co., 104 Mass. 122; Feital *v.* Middlesex R. R. Co., 109 ib. 398; Morse *v.* Brainerd, 41 Vt. 550; R. R. Co. *v.* Mfg. Co., 16 Wall. 324; E. & R. Co. *v.* Androseoggin Mills, 22 ib. 594; *contra*, Converse *v.* N. & N. Y. T. Co., 33 Conn. 166.

[1] Monell *v.* N. C. R. R. Co., 67 Barb. (N. Y.) 531.

[2] Newell *v.* Smith, 49 Vt. 255.

[3] Union Ex. Co. *v.* Shoop, 4 Norris (Pa.), 325.

[4] Bank of Kentucky *v.* Adams Ex. Co., 3 Otto, 174.

[5] Mann *v.* Burchard, 7 Am. Law Reg. (N. S.) 702; Krender *v.* Woolcott, 1 Hilton (N. Y.), 223; B. & P. S. Co. *v.* Brown, 4 P. F. Sm. (52 Pa.) 77; Palmer *v.* Holland, 51 N. Y. 416; DeVilliers *v.* Schooner John Bell, 6 La. Ann. Rep. 544; Bussey *v.* M. & L. R. R. Co., 4 McCrary (D. C.), 405; Gordon *v.* G. W. Ry. Co., 34 U. C. C. B. 224; Peet *v.* C. & N.W. Ry. Co., 19 Wis. 118; Moore *v.* Evans, 14 Barb. (N. Y.) 524; Bryan *v.* M. P. R. R. Co., 11 Bush (Ky.), 597; Ill. C. R. R. Co. *v.* Johnson, 34 Ill. 389;

himself from liability for delay in forwarding, or failure to forward, by pleading increased expense of carriage either on account of increased freight demanded by the connecting carriers, or on account of unforeseen difficulty of transportation.[1]

§ 326. The right to make a contract for a through rate beyond the terminus of his line carries with it also the right to limit the liability on freight so transported also beyond the first carrier's line.[2] So where a through contract contained a clause exempting the first carrier from liability for loss by fire, the exemption was held to apply to the whole route and he was held not liable for a loss by fire on the line of a connecting carrier.[3] The first carrier cannot, however, exempt himself from losses arising from negligence while goods are not upon his own line. This is as much against public policy as if the transportation were all upon his own road.[4]

Clyde *v.* Hubbard, 7 Norris (Pa.), 358; Hill Mfg. Co. *v.* Boston & L. R. Co., 104 Mass. 122; Cutts *v.* Brainard, 42 Vt. 566; Newell *v.* Smith, 49 ib. 255; R. R. Co. *v.* Pratt, 22 Wall. 123; Lock Co. *v.* R. R. Co., 48 N. H. 339; Baltimore Steamboat Co. *v.* Brown, 54 Pa. St. 77; R. R. Co. *v.* Androscoggin Mills, 22 Wall. 594; Collins *v.* B. & E. Ry. Co., 11 Ex. 790; Coxon *v.* G. W. R. Co., 5 H. & N. 274; Scothorn *v.* S. S. Ry. Co., 8 Ex. 341; Crouch *v.* G. W. R. Co., 2 H. & N. 491; Muschamp *v.* Lancaster R., 8 M. & W. 421; Wilby *v.* W. C. R. Co., 2 H. & N. 703; Root *v.* G. W. R. R. Co., 45 N. Y. 525; G. W. R. R. Co. *v.* Crouch, 3 H. & N. 183; Watts *v.* The Saxon, 11 La. Ann. Rep. 43; Weed *v.* S. & S. R. R. Co., 19 Wend. (N. Y.) 534; Mytton *v.* Midland Ry. Co., 4 H. & N. 615; Coxon *v.* G. W. Ry. Co., 5 ib. 274; Collins *v.* Bristol, etc., Ry. Co., 11 Exch. 790; 1 H. & N. 517; 7 H. of L. Cases, 194; Swift *v.* Pac. Mail, etc., Co., 106 N. Y. 206; Mo. Pac. Ry. Co. *v.* Young, 25 Neb. 651; Fox *v.* Boston, etc., Ry. Co., 148 Mass. 220.

[1] Condict *v.* G. T. R. R. Co., 54 N. Y. 500.

[2] Watts *v.* The Saxon, 11 La. Ann. Rep. 43.

[3] E. & C. R. R. Co. *v.* Androscoggin Mills (U. S. S. C.), 32 Leg. Int. 355; Directors B. & E. Ry. Co. *v.* Collins, 7 H. L. Cas. 194; T. P. & W. R. R. Co. *v.* Merriman, 52 Ill. 123. Where there was a contract for freight, and the bill of lading said: "The responsibility of this company as a common carrier under this bill of lading . . . . to terminate when (the goods are) unloaded from the cars at the place of delivery," and it appeared that through freight was never unloaded by the company at its terminus, but proceeded on to its destination in the cars in which it was received; and an action for non-delivery held that upon their own showing the company were liable beyond their terminus. T. P. & W. R. R. Co. *v.* Merriman, 52 Ill. 123.

[4] C. H. & D. and D. & M. B. R.

§ 327. The contract to carry beyond the terminus of the line may be either expressed or implied.[1] Whether or not such a contract was made is a question of fact for the jury to decide from all the circumstances of the case.[2] The bill of lading may be the proof of the contract, either alone or in connection with other evidence.[3] The receipt by the first carrier of freight for the entire distance,[4] statements of the agents of the carrier made when the bill of lading was given, or any understanding between the parties at the time the goods were shipped, may all be evidence.[5]

§ 328. Upon the question of the mere receipt of goods marked for a destination which is beyond the terminus of his own route and to reach which it is necessary to pass over other lines than those of the carrier to whom the goods are delivered, the rule in regard to the latter's liability for loss occurring on other lines than his own is different in the several States. In the United States Courts,[6] in Pennsylvania,[7] New York,[8] Maine,[9]

Co. *v.* Pontius, 19 Ohio St. 221; Condict *v.* G. T. R. Co., 54 N. Y. 500.

[1] P. & R. R. R. Co. *v.* Ramsey, 8 Norris (Pa.), 474.

[2] Bryan *v.* M. & P. R. R., 11 Bush (Ky.), 597; Ill. Cent. R. R. Co. *v.* Johnson, 34 Ill. 389; Clyde *v.* Hubbard, 7 Norris (Pa.), 358; Crawford *v.* S. R. Assn., 51 Miss. 222; Morse *v.* Brainerd, 8 Am. Law Reg. N. S. 604; St. John *v.* Express Co., 1 Wood (U. S. C. C.), 612.

[3] Clyde *v.* Hubbard, 7 Norris (Pa.), 358; R. R. Co. *v.* Pratt, 22 Wall. 123; E. Tenn. R. R. Co. *v.* Rogers, 6 Heisk. (Tenn.) 143.

[4] Weed *v.* S. R. R. Co., 19 Wed. 534; Candee *v.* P. R. R. Co., 21 Wis. 582; St. John *v.* Exp. Co., 1 Woods's Rep. 612; R. R. Co. *v.* Androscoggin Mills, 22 Wall. 594.

[5] St. John *v.* Exp. Co., 1 Woods, 612; Robinson *v.* M. D. T. Co., 45 Iowa, 470; Root *v.* G. W. R. Co., 45 N. Y. 524; R. R. Co. *v.* Pratt, 22 Wall. 123; Hill Mfg. Co. *v.* B. L. R. R. Co., 104 Mass. 122; Quimby *v.* Vanderbilt, 17 N. Y. 306; Coal and Oil Co. *v.* H. & St. J. R. R. Co., 35 Mo. 84; P. & R. R. Co. *v.* Berry, 18 P. F. Sm. (Pa.) 272; Rome R. R. *v.* Sloan, 39 Ga. 636.

[6] Railroad Co. *v.* Pratt, 22 Wall. 129; R. R. Co. *v.* Mfg. Co., 16 ib. 318; *contra*, St. John *v.* The Exp. Co., 1 Woods's Rep. (C. C.) 612.

[7] Jenneson *v.* C. & A. R. R. Co., 5 Clark (D.C. of Phila.), 409; Mullarkey *v.* P. W. & B. R. R. Co., 9 Phila. (D. C. of Phila.) 114; Clyde *v.* Hubbard, 7 Norris (Pa.), 358; Camden & A. R. R. Co. *v.* Forsyth, 61 Pa. St. 81.

[8] Isaacsen *v.* N. Y. C. & H. R. R. Co., 25 Hun (N. Y.), 350; Rawson

[9] Skinner *v.* Hall, 60 Me. 477; Inhabitants *v.* Hall, 61 ib. 517; Perkins *v.* Portland & C. R. R. Co., 47 ib. 573; Hadd *v.* U. S. & E. Express Co., 52 Vt. 335; Morse *v.* Brainerd, 41 ib. 550.

Vermont,[1] Massachusetts,[2] Maryland,[3] North Carolina,[4] Connecticut,[5] Indiana,[6] Missouri,[7] Minnesota,[8] Mississippi,[9] Michigan,[10] and Virginia,[11] the carrier may by special contract extend his liability to the final destination; but in the absence of such contract or of a partnership relation existing between carriers on the line, a carrier is only liable for losses occurring on his own line and is responsible only for the safe and seasonable delivery of the goods to the succeeding carrier in the direction of the transportation. The simple receipt of goods directed to a point beyond the carrier's route does not create a special con-

v. Holland, 59 N. Y. 611; Dillon *v.* N. Y. & E. R. R. Co., 1 Hilt (N. Y.), 231; Van Santwood *v.* St. John, 6 Hill (N. Y.), 157; Barclay *v.* Clyde, 2 E. & D. Smith (C. P. N. Y.), 95; Irwin *v.* N. Y. C. & H. R. R. Co., 59 N. Y. 653; Root *v.* G. W. R. R. Co., 45 ib. 525; St. John *v.* Van Santwood, 25 Wendell (N. Y.), 660; Foy *v.* T. & B. R. R. Co., 24 Bart. (N. Y.) 382; Mallory *v.* Barrett, 1 Ex. Smith, 234 (C. P. of N. Y.); Smith *v.* N. Y. C. R. R. Co., 43 Bart. 225; Jennings *v.* Grand Trunk Ry. Co., 52 Hun (N. Y.), 227.

[1] Brintnall *v.* S. & W. R. R. Co., 32 Vt. 665; Cutts *v.* Brainerd, 42 ib. 567; Farmers,' etc., Bank *v.* Champlain T. Co., 16 ib. 52 and 18 ib. 131.

[2] Burroughs *v.* N. & W. R. R. Co., 100 Mass. 26; Pendergast *v.* Adams Exp. Co., 101 ib. 120; Nutting *v.* C. R. R. Co., 1 Gray (67 Mass.), 502; W. Mfg. Co. *v.* P. W. R. R. Co., 113 Mass. 490; Darling *v.* Boston, etc., R. R., 11 Allen (Mass.), 295; Crawford *v.* South. R. Assn., 51 Miss. 222.

[3] B. & O. R. R. Co. *v.* Green, 25 Md. 72; B. & O. R. R. Co. *v.* Schumacher, 29 ib. 168.

[4] Phillips *v.* N. C. R. R. Co., 78 N. C. 294.

[5] Converse *v.* N. & N. J. T. Co., 6 Am. Law Reg. N. S. 214 (S. C. of Conn.); Elmore *v.* Navgatuck R. R. Co., 23 Conn. 457; Navgatuck R. R. Co. *v.* Waterbury Button Co., 24 ib. 483; Hood *v.* N. Y., etc., R. Co., 22 ib. 502.

[6] P. C. & St. L. R. Co. *v.* Morton, 61 Ind. 539; U. S. Exp. Co. *v.* Rush, 24 ib. 403.

[7] Coates *v.* U. S. Exp. Co., 45 Mo. 238; Mo. Coal & Oil Co. *v.* H. & St. J. R. R. Co., 35 Mo. App. 84; Freeburg Coal Co. *v.* U. R. T. Co., 10 ib. 596; Barrett *v.* I. St. L. R. R. Co., 9 ib. 226; Schutter *v.* Adams E. Co., 5 ib. 316; Wyman *v.* C. & N. R. R. Co., 4 ib. 35; Cramer *v.* A. M. U. E. Co. & M. D. Co., 56 Mo. 524; McCarthy *v.* T. H. & I. R. R. Co., 9 Mo. App. 159; Baker *v.* Mo. Pac. Ry. Co., 19 ib. 321.

[8] Lawrence *v.* W. St. P. R. R. Co., 15 Minn. 390; Ortt *v.* Minneapolis, etc., R. Co., 36 ib. 396.

[9] Lowenberg *v.* Jones, 56 Miss. 688; Crawford *v.* Southern R. R. Assn., 51 ib. 222.

[10] D. & B. C. Ry. Co. *v.* McKenzie, 43 Mich. 609; McMillan *v.* Michigan, etc., R. Co., 16 ib. 79; M. C. R. Co. *v.* Burrows, 1 Law & Eq. Rep. 86.

[11] McConnell *v.* Norfolk, etc., R. Co. (Va.), 9 Southeast Rep. 1006.

tract to carry them to the destination, nor does giving the shipper a through rate.[1] It is presumed when a carrier receives goods marked to a point beyond its own line that he is to carry the goods to the end of his own route, and from that point to act merely as a forwarder, to deliver them to the succeeding carrier in the line of transportation. If the second carrier refuses or neglects to receive them, the first carrier may store the goods. The nature of the bailment then changes and he becomes liable only as a warehouseman.[2]

§ 329. Where, however, several carriers are associated in a continuous line of transportation and in the course of business goods are carried through the connected lines for one price, under an agreement by which freight-money is divided among the associated carriers in proportions fixed by their agreement; in short, where there is a partnership of carriers, if the carrier at one end of the line receives the goods to be transported through, marked for a consignee at the other end of the line and on the delivery of the goods takes pay for the transportation of the goods through, the carrier who receives the goods is bound to carry them, or see that they are carried, to their final destination and is liable for an accidental loss happening on any part of the line.[3] The latter rule has been adopted in England,[4] Illinois,[5]

[1] McCarthy *v.* T. H. I. R. R. Co., 9 Mo. Ap. 159; Converse *v.* N. H. Y. Trans. Co. (S. C. of Conn.), 6 Am. Law Reg. N. S. 214; Stewart *v.* T. H. I. R. R. Co., 3 Fed. Rep. (U. S. C. C. Dist. Mo.) 768.

[2] Rawson *v.* Holland, 59 N. Y. 611.

[3] Coates *v.* U. S. Express Co., 45 Mo. 238; Mo. Coal and Oil Co. *v.* H. & St. J. R. R. Co., 35 ib. 84; Freeburg Coal Co. *v.* Union Ry. Transit Co., 10 Mo. App. 596; Schutter *v.* Adams Exp. Co., 5 ib. 316; Barrett *v.* I. & St. L. R. R. Co., 9 Mo. 226; Wyman *v.* C. & A. R. R. Co., 4 Mo. App. 35; Cramer *v.* Am. M. U. Exp. Co. and M. D. Co., 56 Mo. 524; Nashua Lock Co. *v.* W. & N. R. Co, 48 N. H. 339; 10 Am. Law Reg. (N. S.) 244; Hill Mfg. Co. *v.* B. & L. R. R. Corp., 104 Mass. 122.

[4] Muschamp *v.* L. & P. R. Ry. Co., 8 M. & W. 421; E. T. & Va. R. R. Co. *v.* Rogers, 6 Heiskell (Tenn.), 143.

[5] Ill. Cent. R. R. Co. *v.* Copeland, 24 Ill. 332; Chicago, etc., R. Co. *v.* People, 56 ib. 365; U. S. Exp. Co. *v.* Haines, 67 ib. 137; Ill. Cent. R. R. Co. *v.* Cowles, 32 ib. 116; Ill. Cent. R. R. Co. *v.* Johnson, 34 ib. 389; Ill. Cent. R. R. Co. *v.* Frankenberg, 54 ib. 88; C. & M. W. Ry. Co. *v.* Montfort, 60 ib. 175; Field *v.* C. & R. G. R. R. Co., 71 ib. 458; T. W. W. Ry. Co. *v.* Lockhart, 71 ib. 627; M. & St. P. Ry. Co. *v.* Smith, 74 ib. 197; Ohio & M. R. Co. *v.* Emrich,

Georgia,[1] Wisconsin,[2] Tennessee,[3] Iowa,[4] Alabama,[5] Kansas,[6] Florida,[7] and New Hampshire,[8] even where no partnership relations exist between the carriers. In these jurisdictions while he may by special contract limit his liability to his own line, yet where a common carrier receives goods marked to a particular place, he is bound *prima facie*, under an implied agreement from the mark or direction, to deliver at such place, though it be beyond his own route. If damage or loss occur, the carrier who received the goods in the first instance must account to the owner, whether the loss occurred on his own line, or that of some other carrier in the line of transit. The contract of the shipper is with the carrier to whom he intrusted the goods. *A fortiori*, therefore, the carrier is liable to deliver at final destination when the agreement to do so is express.[9] This is a liability which arises out of a contract which is implied from the receipt of the goods marked to a particular destination. If the carrier, then, can show a uniform usage, known to the shipper, to undertake for its own line alone and if he received freight from the shipper for this service alone,

24 Ill. App. 245; Adams Exp. Co. *v.* Wilson, 81 Ill. 339; Erie Ry. Co. *v.* Wilcox, 84 ib. 239; Merchants Disp. Trans. Co. *v.* Moore, 88 ib. 136; Pennsylvania Co. *v.* Fairchild, 69 ib. 260.

[1] Rome R. R. *v.* Sullivan, 25 Ga. 228; Southern Exp. Co. *v.* Shea, 38 ib. 519; Cohen *v.* Southern Exp. Co., 45 ib. 148; Mosher *v.* South. Exp. Co., 38 ib. 37; Falvey *v.* Georgia R. Co., 76 ib. 597.

[2] Wahl *v.* Holt, 26 Wis. 703; Hooper *v.* C. & N. W. Ry. Co., 27 ib. 81; Parmelee *v.* W. Trans. Co., 26 ib. 439; Congar *v.* C. & G. R. R. Co., 17 ib. 477; Hermann *v.* Jordrich, 21 ib. 536; Hansen *v.* Flint, 73 ib. 346.

[3] L. & N. R. R. Co. *v.* Campbell, 7 Heiskell (Tenn.), 253; M. C. R. R. Co. *v.* Stockard, 11 ib. 568; E. T. & Va. R. R. Co. *v.* Rogers, 6 ib. 143; Western, etc., R. R. Co. *v.* McElwee, 6 ib. 208; Carter *v.* Peek, 4 Sneed (Tenn.), 203; E. T. R. R. Co. *v.* Nelson, 1 Cold. (Tenn.) 272.

[4] Mulligan *v.* Ill. Cent. R. R. Co., 36 Iowa, 181; Augle *v.* Miss. & Mo. R. R. Co., 9 ib. 487.

[5] M. & G. R. R. Co. *v.* Copeland, 63 Ala. 219; Logan *v.* Mobile Trade Co., 46 ib. 514; Alabama, etc., R. Co. *v.* Thomas, 83 ib. 343.

[6] St. L., K. C. N. R. Co. *v.* Piper, 13 Kansas, 505.

[7] Bennet *v.* Filyaw, 1 Fla. 403.

[8] Gray *v.* Jackson, 51 N. H. 9; Lock Co. *v.* R. R., 48 ib. 339.

[9] Ill. Cent. R. R. Co. *v.* Johnson, 34 Ill. 389.

this would suffice to rebut the contract implied from the directions.[1]

§ 330. The rule has been well stated in the Georgia cases, where it is said that where a common carrier receipts for goods to be transported beyond his terminus he undertakes to transport them to their destination by himself or by competent agents and he will be liable if the goods are lost beyond the terminus of his own line. He is bound to deliver them to the proper custody to insure their safe transportation.[2]

In Kansas a carrier, who received the goods for transportation beyond his own terminus, stipulated that he was to be liable only as forwarder. He was held liable as common carrier for the whole distance.[3]

§ 331. A bill of lading receipting for full freight to the point of delivery has been held sufficient evidence of a through contract between the two points.[4] Where the bill of lading contained the clause "for transporting the merchandise from L. to C.," the latter point being beyond the end of the carrier's line, it was held to be a through contract,[5] as, also, where the contract read, "to be delivered . . . . at B.," and again "to be delivered on presentation of this receipt at C.," B. and C. being beyond the end of the respective carrier's lines.[6] Again, where a bill of lading provided that the goods should be transported by the carrier "to the terminus of its road, and there delivered to the agent of connecting steamboat, railway companies, or forwarding lines," and was marked "contract for through rate," this contract was with the first carrier, who gave the bill of lading and who was the carrier for the whole distance.[7]

[1] W. & A. R. R. Co. *v.* McElwee, 6 Heiskell (Tenn.), 208; Mulligan *v.* Ill. Cent. R. R. Co., 36 Iowa, 181; Augle *v.* Miss. & Mo. R. R. Co., 9 ib. 487.

[2] Southern Exp. Co. *v.* Shea, 38 Ga. 519.

[3] St. L., K., C. & M. R'y Co. *v.* Piper, 13 Kan. 505.

[4] B. & P. S. Co. *v.* Brown, 4 P. F. Sm. (Pa.) 77; Krender *v.* Woolcott, 1 Hilton (N. Y.), 223.

[5] Mann *v.* Bichard, 7 Am. Law Reg. (N. S.) (40 Vt.) 702; Nutting *v.* C. R. R. R. Co., 1 Gray (Mass.), 502.

[6] De Villiers *v.* Schr. John Bell, 6 La. Ann. Rep. 544; Kyle *v.* Lawrence R. R. Co., 10 Rich. L. Rep. (S. C.) 382.

[7] Gordon *v.* G. W. Ry. Co., 34 U. C. Q. B. 224.

§ 332. A receipt beginning, "Received (as agents, and forwarders)," said, "Contracts from Neenah to New York at $2.25 per bushel." This was an express undertaking on the part of the carrier (whose line ended at Chicago) to transport to New York and imposed upon him the responsibility of a carrier for the whole route.[1] Where the agent told the shipper that he could "send it on and collect back to this office, and I will do that if you will pay me promptly the express charges when I get the return," it was held to be sufficient evidence of a through contract to submit to a jury.[2] Where the only mention made in the contract of the final destination was that accidentally made on the description of the goods as "marked to, etc." (the marks themselves raising no contract), it was held not to be a through contract,—the description being only for the purpose of identification.[3]

§ 333. The use of the word "forward" in a bill of lading does not change a common carrier to a mere forwarder, if the contract is really one of a common carrier. In Mercantile Mut. Ins. Co. *v.* Chase,[4] Mr. Justice WOODRUFF, said: "The use of the term 'forward' in the contracts is controlled by the nature and extent of the actual undertaking."

In forwarding goods beyond the end of his route, a carrier is bound generally to follow with fidelity the precise instructions of the consignor, or suffer the risk of deviation therefrom. In the absence of express stipulations, the instructions become part of the contract under which the goods are committed to the carrier. If he has stipulated in writing that he may forward by any customary mode which is safe and prudent, it is a variation of his contract to permit any oral direction to control it and fix upon him a different duty.[5]

§ 334. A carrier undertaking to carry goods over his own

[1] Peet *v.* C. & N. W. Ry. Co., 20 Wisc. 594.

[2] P. & R. R. R. Co. *v.* Ramsey, 8 Norris (Pa.), 474.

[3] Babcock *v.* L. S. & M. S. R. R. Co., 49 N. Y. 491.

[4] 1 E. D. Smith (N. Y.), 115; Buckland *v.* Adams Express Co., 97 Mass. 124.

[5] Hinckley *v.* N. Y. C. & H. R. R. R. Co., 56 N. Y. 429; Brintnall *v.* S. & W. R. R. Co., 32 Vt. 665; C. & N. W. Ry. Co. *v.* N. L. Packet Co., 70 Ill. 217; Snow *v.* Ind. & R. Co., 109 Ind. 422.

line and then forward them to a destination beyond, is bound to transmit with them to the carrier next *en route* all special instructions received by him from the consignor and failing to do so in any substantial particular, is liable for loss resulting therefrom.[1]

In the Lowell Wire Fence Co. *v.* Sargent,[2] it was held that an expressman, doing business between two points only and not undertaking personally for the carriage of goods to any farther point, but merely engaging to forward them to their destination, was only required to forward a bill marked "for collection," with the goods, through the ordinary channels of communication.

§ 335. If a forwarding agent sends goods in a mode prohibited by the owner, he does it at his own risk and incurs the liability of an insurer. An extreme example of the application of this rule is found in Johnson *v.* N. Y. R. R. Co.,[3] where the defendant undertook to transport merchandise to Albany and forward thence to New York, in accordance with the shipper's instructions, by the People's Line of steamboats only. The People's Line refusing to take the goods the defendant sent them in another way and they were lost. The court held that the defendant was liable for the loss. In the recent Pennsylvania case of P. and R. R. R. Co. *v.* Beck,[4] it was held that where a railroad company, in disregard of a shipper's instructions and of its own undertaking, forwards merchandise by steamer instead of by rail and the merchandise is lost by fire on the steamer, the railroad company is responsible for the loss, in an action on the contract.

§ 336. Where goods are described in the bill of lading as destined for a place beyond that to which the carrier undertakes to transport them, it is his duty, in the absence of contrary custom or instruction, to forward them by the usual conveyance towards the place of ultimate destination. If he

[1] Little M. R. R. Co. *v.* Washburn, 22 Ohio St. 324; S. & M. R. R. Co. *v.* Butts, 43 Ala. 385.

[2] 8 Allen (Mass.), 189.

[3] 33 N. Y. 610. But see Regan *v.* Grand Trunk R. Co., 61 N. H. 579.

[4] 125 Pa. St. 620. See also Condict *v.* Grand Trunk Ry. Co., 4 Lansing (N. Y.), 106.

does so he is not liable for their subsequent loss.[1] In Simkins *v.* N. and L. Steamboat Co.,[2] an action was brought against the defendant for not properly forwarding a fishing seine from New York to Norfolk, Virginia, so that it arrived too late for the season. In accordance with the general custom, it was sent in a sailing vessel, that being twenty times less expensive than sending by rail or steamboat. The court held that the defendant was not liable.

Where a common carrier takes goods "to forward and deliver if within his route; if not, to deliver to the connecting express or stage at the most convenient point," his liability as a common carrier ceases when the goods arrive at such convenient point of intersection.[3]

§ 337. A contract to "forward" beyond the terminus of the carrier's own line sometimes makes him liable as a common carrier for the whole distance and liable for loss on that part of the route in which he is not interested.[4] The carrier may, however, expressly stipulate for exemption from such liability.[5] Thus, if an express company agrees to forward a package to a point beyond the terminus of its route, the contract expressly limiting its liability to that of forwarders and, through charges not having been paid, the liability of the company as a common carrier ceases at the end of its route.[6]

§ 338. Where a carrier is engaged in the public transportation of goods for hire, he cannot escape the liability of a common carrier by calling himself a "forwarder only" in bills

[1] Brown *v.* Mott, 22 Ohio St. 149; Snow *v.* Ind., etc., R. Co., 109 Ind. 422; Hostetter *v.* Baltimore, etc., R. R. Co. (Pa.), 11 Atl. Rep. 609; McKay *v.* N. Y. Cent., etc., R. Co., 50 Hun (N. Y.), 563.

[2] 11 Cush. (Mass.) 102.

[3] Inhabitants of Plantation No. 4 *v.* Hall, 61 Me. 517. See also Armstrong *v.* G. & T. Ry. Co., 2 P. & B. 445.

[4] Wilcox *v.* Parmelee, 3 Sanford (N.Y.), 610; St. L., K. C. & N. Ry. Co. *v.* Piper, 13 Kansas, 505; McMillan *v.* M. S. & N. I. R. Co., 16 Mich. 79; Mosher *v.* Southern Exp. Co., 38 Ga. 37.

[5] Rogers *v.* G. W. Ry. Co., 16 U. C. Q. B. 389; Am. Exp. Co. *v.* 2d Nat. Bank of Titusville, 69 Pa. St. 394; Ætna Ins. Co. *v.* Wheeler, 49 N. Y. 616; Snider *v.* Adams Exp. Co., 63 Mo. 376; Richerson, etc., Co. *v.* Grand Rapids, etc., Co., 32 Am. & Eng. Ry. Cases, 487.

[6] Reed *v.* U. S. Exp. Co., 48 N.Y. 462.

of lading.[1] Thus, in an action against an express company for loss of a package of gold by an explosion on board of a tug, it was held that the restriction "not to be responsible except as forwarders," did not exempt the defendants from liability for loss occasioned by the negligence of the agencies employed by them.[2]

§ 339. As a general rule where a carrier limits his liability to his own line he will not be responsible for a loss occurring after he has delivered the goods to another carrier.[3] Such a limitation of the carrier's liability does not violate a State law forbidding any limitation of the common law liability.[4] In Rickets *v.* B. & O. R. R. Co.,[5] goods were to be carried over several lines under a contract providing that no connecting carrier should be held liable for any loss or damage to goods except on its route. The defendant was held not liable for a loss of the goods after their delivery to a steamboat on the Ohio River. In McCann *v.* B. & O. R. R. Co.,[6] goods were shipped from Baltimore to St. Louis. The receipt of the first carrier stated: "The responsibility of the company is to terminate when the goods are unloaded from the car." The Court held that the first carrier was not liable for an injury which happened after transshipment of the goods to the cars of another railroad company, forming a part of the route to St. Louis.

§ 340. A common carrier may by special contract protect himself against liability for loss not occurring on his own line, even in those States where the acceptance of goods by the first carrier makes him liable for the through transportation. Such a contract will be presumed from the fact that a clause is

[1] Christenson *v.* Am. Exp. Co., 15 Minn. 270.

[2] Hooper *v.* Wells, Fargo & Co., 27 Cal. 12.

[3] Rogers *v.* G. W. R., 16 U. C. Q. B. 389; Taylor *v.* L. R. M. R. & T. R. R. Co., 32 Ark. 393; C. H. & D. and D. & M. R. R. Co. *v.* Pontius, 19 Ohio, 221; Field *v.* C. & R. I. R. R. Co., 71 Ill. 458; M. D. T. Co. *v.* Moore, 88 ib. 136; Foy *v.* T. & B. R. R. Co., 24 Barb. (N. Y.) 382; Aldridge *v.* G. W. R. R. Co., 15 C. B. (N. S.) 582; Ortt *v.* Minneapolis, etc., R. R. Co., 36 Minn. 896; T. & P. R. R. Co. *v.* Rogers, 3 Southwest Rep. 660; Cent. R. R. Co. *v.* Avant, 80 Ga. 195.

[4] Mulligan *v.* Ill. Cent. R. R. Co., 36 Iowa, 187.

[5] 59 N. Y. 637.

[6] 20 Md. 202.

printed in the bill of lading, even though the shipper's attention was not called to it, if it appears that he had previously shipped like articles and taken like bills of lading.[1] When the bill of lading says: "The company will not be responsible for any goods missent, unless they are consigned to a station on the railway," the company are not liable for any loss beyond, if they have duly forwarded from their own terminus.[2] The liability of a railroad company is effectually limited to its own line by stipulating, that when goods are directed to consignees beyond its line, delivery by it shall be complete and its responsibility cease, when the subsequent carriers receive notice that it is ready to deliver the goods to them for further conveyance.[3] In Wisconsin a company may limit its liability to its own line of road by express contract and so exonerate itself from the default or negligence of other carriers on the route. This may be accomplished by conditions printed on the back of the bill of lading and referred to on the face thus: "Subject to their tariff and under the conditions stated on the other side."[4] A carrier in Massachusetts may effectually limit his liability to his own route by stipulating that delivering to other parties to complete the transportation should terminate all liability of the carrier himself for the property intrusted to him.[5] In Kansas a carrier may provide by contract that his liability shall not extend beyond his own line.[6] The Supreme Court of Illinois says, that while it is true that a railroad may restrict its liability to its own line, it cannot be denied that it may extend its liability beyond its own line.[7]

§ 341. In England, the first carrier, in order to claim exemption under a contract limiting his liability to his own line, must show that the goods were delivered uninjured into the hands of another carrier.[8]

[1] E. T., Va. & Ga. R. R. Co. *v.* Brumley, 5 Lea (Tenn.), 401; Louisville, etc., R. R. *v.* Meyer, 78 Ala. 597.

[2] Chartier *v.* G. T. Ry. Co., 17 Low. Can. Jur. 26.

[3] Rennie *v.* Northern Ry. Co., 27 U. C. C. P. 153.

[4] D. & M. R. R. Co. *v.* F. & M. Bank, 20 Wis. 122.

[5] Pendergast *v.* Adams Exp. Co., 101 Mass. 120.

[6] Berg *v.* A. T. & St. F. R. R. Co., 30 Kans. 561.

[7] St. L. & I. M. R. R. Co. *v.* Larned, 103 Ill. 293.

[8] Kent *v.* Midland R. Co., 10 Q. B. 1.

CHAPTER XXIV.

LIABILITY OF INTERMEDIATE CARRIERS UNDER A "THROUGH" BILL OF LADING.

An intermediate carrier must deliver to the next succeeding carrier, § 342.
The carrier in possession of the goods when destroyed is liable to the shipper, § 343.
Such a carrier may show in defence the misconduct of the preceding carrier, § 344.
Effect of several carriers being associated for through transportation, § 345.
To hold final carrier for injury to goods shipped, delivery to first carrier in good condition must be shown, § 346.
Goods shipped in good condition are presumed to remain so until delivery to the final carrier, § 347.
General limitation of liability in the bill by the first carrier enures to the benefit of succeeding carriers, §§ 348, 349.
Succeeding carriers are not benefited by the contract made by a first carrier only for the latter's behalf, § 350.

§ 342. In the absence of any special agreement or custom which enters into the contract, where goods are delivered to the carrier for transportation directed to a point beyond the terminus of his route, between which and the place of destination of the goods there are other succeeding connecting lines of transportation, the intermediate carrier is bound to transport the goods safely to the end of his route and deliver them to the next carrier on the route beyond. In such case he is not relieved from his liability as insurer of the goods by simply unloading them at the end of his route and storing them in a warehouse, without delivery or notice or any attempt to deliver to the next carrier.[1] In Ladue *v.* Griffith,[2] Mr. Justice Smith said: "While goods are in the process of transportation from the place of their receipt to the place of destination it will never do in this country, in my opinion, to subject them in the hands of any carrier, or by his act or order, to the responsibilities of a mere warehouseman." In Sherman *v.* Hudson

[1] Irish *v.* M. & St. P. R. R. Co., 19 Minn. 376.

[2] 11 Smith (25 N. Y.), 364.

River R. Co.,[1] Mr. Justice EARL, said: "In the case of transportation of property over several railroads constituting a continuous line, none of the roads can be said to be agents of the owner. Each is exercising an independent employment and is contractor with the owner, the contract being either express or such as the law implies. Each is responsible for its own negligence."

§ 343. The general rule may therefore be stated to be that when goods are shipped to be transferred to successive carriers, the carrier in whose possession they are when destroyed or injured is liable to the owner or consignee for the loss and in the absence of custom or contract to the contrary, an intermediate carrier is not liable for the injuries received before or after the goods were in his possession.[2]

§ 344. A carrier may show, in defence to an action for a loss of goods, any injury, loss, fraud, or deceit occasioned or practised by any previous carrier or by the shipper of the goods.[3] Thus proof of negligent delay by the second carrier, without which the injury would not have happened, would be a complete defence in an action for damages arising from alleged delay of the first carrier when the delay happened after

[1] 64 N. Y. 254.

[2] Packard *v.* Taylor, 35 Ark. 402; Conkey *v.* Milwaukee & St. Paul Ry. Co., 31 Wisc. 619; Hooper *v.* Chicago & N. W. Ry. Co., 27 ib. 81; Lowenburg *v.* Jones, 56 Miss. 688; Sumner *v.* Southern R. R. Assn., 7 Baxter (Tenn.), 345; E. Tenn. & Ga. R. R. *v.* Nelson, 1 Coldwell (Tenn.), 272; Rome R. R. Co. *v.* Sullivan, 25 Ga. 228; Bryant *v.* Southwestern R. R. Co., 68 ib. 805; South. Exp. Co. *v.* Thornton, 41 Miss. 216; The Convoy's Wheat, 3 Wallace, 225; Lesinsky *v.* Great Western Dispatch, 10 Mo. App. Rep. 134; Carson *v.* Harris, 4 Greene (Iowa), 516; Hill *v.* B. C. R. & N. R. Co., 60 Iowa, 196; Bissel *v.* Price, 16 Ill. 408; Ill. Cent. R. R. Co. *v.* Cowles, 32 ib. 116; McMillian *v.* M. S. & N. I. R. R. Co., 16 Mich. 79; Rogers *v.* Wheeler, 6 Lansing (N. Y.), 420; Babcock *v.* L. S. M. S. R. R. Co., 49 N. Y. 491; Goold *v.* Chapin, 10 Barb. (N. Y.) 612; Northrop *v.* S. B. & N. Y. R. R. Co., 3 Abb. Dec. 386; Rawson *v.* Holland, 59 N. Y. 611; Canfield *v.* Northern R. R. Co., 18 Barb. (N. Y.) 586; Root *v.* Grt. Western R. R. Co., 45 N. Y. 525; Smith *v.* N. Y. C. R. R. Co., 43 Barb. (N.Y.) 225; Packard *v.* Taylor, 35 Ark. 402; Knott *v.* Raleigh, etc., R. Co., 98 N. C. 73; Wallingford *v.* Columbia, etc., R. Co., 26 S. Car. 258; Wernwag *v.* Philadelphia, etc., R. Co., 117 Pa. St. 46; Independence Mills Co. *v.* Burlington, etc., R. Co., 72 Iowa, 535; Harris *v.* Grand Trunk Ry., 15 R. I. 371.

[3] G. W. R. R. Co. *v.* McDonald, 18 Ill. 172; Hill *v.* B. C. R. & N. R. R. Co., 60 Iowa, 196.

delivery to the second.[1] So where goods were carried first by a steamship company and then by a railroad company and the latter was sued for damage to the goods, it was held that if the jury were satisfied that there was no connection between the railroad company and the steamship company and that the goods were damaged by the latter and not by the former, the former was not liable.[2] In Southern Express Co. *v.* Urquhart[3] goods were lost by the second carrier. There was no proof of the terms on which they were carried either by the first or by the second carrier. It was held that the owner might adopt the act of the first carrier, treat his delivery of the goods as authorized and sue the second carrier on his implied undertaking as a common carrier,—his liability as such being presumed in the absence of proof to the contrary. In Wright *v.* N. C. R. R. Co.,[4] a second carrier on receiving goods, omitted certain directions from its manifest and the goods were lost. The company was held liable for its mistake.

Where, however, goods are damaged in the hands of the first carrier and the second carrier, knowing this fact and intending to aid in concealing it, gives the first carrier a clean bill of lading, he will not be allowed to show that they were damaged when he received them in order to avoid the payment of the damages.[5]

§ 345. Where several common carriers are associated to form a continuous line and each is empowered to contract for freight and passengers for the whole line and to receive pay for the same, which is to be divided in prescribed proportions, they are jointly liable for losses upon any part of the line[6]

[1] M. C. R. R. Co. *v.* Burrows, 33 Mich. 6.

[2] M. & W. R. R. Co. *v.* Moore, 51 Ala. 394.

[3] 52 Ga. 142.

[4] 8 Phila. 19; O'Rourke *v.* The C. B. & Q. R. Co., 44 Iowa, 526.

[5] Bowman *v.* Kennedy (S. C. of Pa.), 1 Am. Law Reg. (O. S.) 119.

[6] Barter *v.* Wheeler, 10 Am. Law Reg. (N. S.) 194; 49 N. H. 9; Block *v.* Erie & North Shore Despatch Fast Freight Line, 21 Am. & Eng. R. R. Cas. 1; F. & W. R. R. Co. *v.* Hanna, 6 Gray (72 Mass.), 539; Baltimore, etc., Steamboat Co. *v.* Brown, 54 Pa. 77; Railroad Co. *v.* Androscoggin Mills, 22 Wall. 594; Railroad Co. *v.* Pratt, ib. 123; Citizens Insurance Co. *v.* The Kountz Line, 4 Wood's Rep. 268; Bostwick *v.* Champion, 11 Wend. (N. Y.) 571; Champion *v.* Bostwick, 18 ib. 175; Briggs *v.* Vanderbilt, 19 Barb. (N. Y.) 222; Hart *v.* Rens-

and if an association of common carriers agrees to guarantee all the bills of lading, each company is bound by a bill of lading issued by any one of them.[1]

§ 346. Where goods are delivered to a common carrier to be carried by a series of connecting lines to the point of destination and the goods are delivered in a damaged condition to the consignee, the shipper must show in an action against the last carrier that the goods were delivered in good condition to the first carrier. The last carrier must then show affirmatively that the goods were not injured on his line. The presumption is that the goods continue in the condition in which they were when the shipper parted with them.[2]

§ 347. In Shriver *v.* S. C. & St. P. R. R. Co.,[3] it appeared that two slabs of marble carried over four railroads arrived broken and the owner sued the last road. The court held that "where goods pass over a line of several different carriers, the jury, there being no direct evidence to the contrary, may presume that they reached the last carrier in the same condition as when delivered to the first." In Laughlin *v.* C. & N. W. Ry. Co.,[4] certain boxes of goods were transported by three successive carriers and on final delivery it was found that one had been broken open and part of the contents stolen. Suit was brought against the last carrier. The court held that the jury might presume, in the absence of evidence to the contrary, that the boxes remained unopened until they came into the possession of the last carrier and that the loss happened

selaer, etc., R. R. Co., 8 N. Y. 37; Gass *v.* New York, etc., R. R. Co., 99 Mass. 220; Converse *v.* Norwich, etc., Transp. Co., 33 Conn. 166; Ellsworth *v.* Tartt, 26 Ala. 733; Montgomery, etc., R. R. *v.* Moore, 51 ib. 394; Wilson *v.* Chesapeake, etc., R., 21 Gratt. (Va.) 654; Schulter *v.* Adams Exp. Co., 6 Cent. L. J. 175; Gill *v.* Manchester, etc., Ry., L. R. 8 Q. B. 186.

[1] Baltimore, etc., R. Co. *v.* Wilkens, 44 Md. 11.

[2] Smith *v.* N. Y. C. R. R. Co., 43 Barbour (N. Y.), 225; Livingston *v.* N. Y. C. & H. R. R. Co., 5 Hun (N. Y.), 562; Harp *v.* The Grand Era, 1 Wood's Rep. 185; Georgia R. R. Co. *v.* Gann, 68 Ga. 350; M. & W. P. R. R. Co. *v.* Moore, 51 Ala. 394; Southern Exp. Co. *v.* Hess, 53 ib. 19; Leo *v.* St. P. M. & M. Ry. Co., 30 Minn. 438; Brintnall *v.* Saratoga & W. R. R. Co., 32 Vt. 665.

[3] 24 Minn. 506.

[4] 28 Wis. 204.

through its fault. In Dixon *v.* R. & D. R. R. Co.,[1] a piano was shipped in good order from Boston to Greensboro, N. C., over several connecting lines. When it was delivered by the last carrier in the line, at Greensboro, it was badly damaged. The court held that the burden of proving that the piano was injured on some other of the connecting lines than their own, was on the defendants and that having failed to do this they were liable for the damage.

In Richardson *v.* "The Charles P. Chouteau,"[2] cotton was shipped on through bills of lading by certain steamboats. When it arrived at its final destination it was in a damaged condition. It appeared that the last steamboat received it in about the same condition in which it was delivered. The court held that the libel should be against the last boat,—the owner of the cotton not being required to ascertain to which of the several boats the damage was attributable.

The receipt of goods given at the place of shipment by the first carrier is evidence against the last carrier, as to the goods shipped, their condition and the terms of the contract.[3]

In Georgia it is provided by statute that the last carrier shall be liable to the consignee for any damage occurring during the whole transit, provided that the goods were originally delivered in good condition.[4]

§ 348. Where goods are delivered to a carrier to be transferred over a number of connecting lines, a bill of lading given by the first carrier stipulating for exemption from liability in general terms inures to the benefit of the several carriers over whose lines the goods are carried. It is, however, only where the contract is for through transportation that each connecting carrier will be entitled to the benefits and exemptions of the contract between the shipper and the first carrier. Otherwise an intermediate carrier's liability is that of an insurer unrestricted by any special contract with the shipper and such liability continues until he delivers to the next connecting carrier.[5]

[1] 74 N. C. 538.

[2] 37 Fed. Rep. 532.

[3] Southern Exp. Co. *v.* Hess, 53 Ala. 19.

[4] Grand Trunk Railway Co. *v.* Atwater, 18 Lower Canada Jurist, 53.

[5] M. D. T. Co. *v.* Bolles, 80 Ill. 473; Manhattan Oil Co. *v.* C. & A. R.

In Whitworth *v.* Erie R. R. Co.,[1] cotton was shipped at Memphis for Jersey City, under contracts with certain transportation companies, exempting them "and their connections" from liability from loss by fire. The cotton was destroyed while in the custody of a connecting carrier. It was held that being one of the "connections," the said carrier was entitled to the benefit of the contract exemptions and not liable unless the fire resulted from negligence. In Wilson *v.* Harry,[2] goods were shipped by steamboat with the right of transshipment. There was a provision in the bill of lading that the owner of the second boat should not be liable for injuries done on board the first one. It was held that the owners of the second boat were not liable in an action of tort for injuries received on board the first, by reason of the first having coerced the payment of the entire freight before delivery of the goods.

§ 349. In the leading English case of Bristol and Exeter Ry. Co. *v.* Collins,[3] goods were delivered to the Great Western Railway Company, to be sent to Torquay. The bill of lading stated that the Great Western Railway Company "will not be answerable for the loss of, or damage to, any goods arising from fire." At Bristol the goods were delivered to the Bristol and Exeter Railway to be carried to Torquay. They were placed in the night on a siding in an open shed of the defendant, where they were destroyed by fire. The House of Lords decided that the Bristol and Exeter Railway was not liable for the loss. The Lord Chancellor (Lord CHELMSFORD) said: "I think, therefore, that the contract was entire; was for the whole journey from Bath to Torquay, and was made with the Great Western Railway Company alone; that the goods were carried

R. Co., 5 Abb. Pr. N. P. (N. Y.) 289; Faulkner *v.* Hart, 82 N. Y. 413; Maghee *v.* Camden, etc., R. R. Co., 45 N. Y. 514; Lamb *v.* Camden, etc., R. R. Co., 46 ib. 271; Whitworth *v.* Erie R. R. Co., 6 Am. & Eng. R. R. Cas., 349; Whitehead *v.* Wilmington, etc., R. R. Co., 9 ib. 168; Taylor *v.* Little Rock, etc., R. R. Co., 39 Ark. 148; Gordon *v.* Great Western Ry. Co., 25 Upper Canada (C. P.), Rep. 488; Erie Ry. Co. *v.* Lockwood, 28 Ohio State, 358; Jenneson *v.* Camden, etc., R. R. Co., 4 Am. Law Reg. 234; U. S. Express Co. *v.* Harris, 51 Ind. 127; Levy *v.* Southern Express Co., 4 S. Car. 234.

[1] 87 N. Y. 413.

[2] 8 Casey (Pa.), 270.

[3] 7 House of Lords, 197.

on the defendants' railway under the contract, and that the defendants are consequently either not liable at all, as no agreement was entered into with them, or that, if the contract in any way attaches to them, the exception as to loss by fire accompanies it and exonerates them from liability."

A connecting carrier who is aiding a first carrier in the performance of his contract, for a compensation to be paid by the latter, to whom the former is but a subordinate, is shielded by a condition against liability for loss by fire in the bill of lading, and this is so although the first carrier did not in regard to fire, as he did in some other respects, make express provisions in the contract for the exemption of connecting lines.[1]

§ 350. An intermediate carrier is not, however, entitled to the benefits of the restrictive contract entered into by the first carrier solely on his own behalf. He is bound to deliver to the carrier next on the route and is not relieved of responsibility by storing the goods at his own terminus in a warehouse.[2] A bill of lading may be a contract by the first carrier to transport goods over his own route and deliver them at the end thereof to a second carrier to be forwarded to their destination and the freight fixed by him for the whole discharged. This will not make it a through contract so as to entitle the succeeding carriers to the benefit of exceptions from liability contained in the contract.[3]

In C. and A. R. R. Co. *v.* Forsyth,[4] the Pennsylvania Railroad Company gave a receipt for oil to be delivered to "Leech at the company's freight station, Philadelphia." Appended to the receipt was, "Rate to Red Hook, 65 cents. . . . . This oil is carried only on open cars and entirely at the owner's risk from fire and leakage while in possession of the railroad company or carriers while standing or in transit." The freight was

[1] Manhattan Oil Co. *v.* C. & A. R. R. & T. Co., 54 N. Y. 197; S. C. 52 Barb. (N. Y.) 72.

[2] Bancroft *v.* M. D. T. Co., 47 Iowa, 262; Witbeck *v.* Holland, 55 Barb. (N. Y.) 443; Martin *v.* Amer. Ex. Co., 19 Wis. 336; Babcock *v.* Lake Shore, etc., R. R. Co., 49 N. Y. 491; Merchants' Despatch Trans. Co. *v.* Bolles, 80 Ill. 473; Burroughs *v.* Grand Trunk R. R. Co., 32 Am. & Eng. R. R. Cases, 467.

[3] Ætna Ins. Co. *v.* Wheeler, 49 N. Y. 616; Gordon *v.* Great Western Ry. Co., 25 Upper Canada (C. P.), 488.

[4] 61 Pa. St. 81.

to be paid at Red Hook. At Philadelphia the Camden and Amboy R. R. Co. received the goods and gave a receipt to "Leech, Agent of Pennsylvania Railroad Company," for the oil to be transported to New York. The oil was destroyed by fire between Philadelphia and Red Hook. The court held that the Camden and Amboy Railroad Company was liable for the loss, as there was no contract with the defendants other than the receipt of their shipping agent for the oil, which contained no limitation of the carrier's liability at common law.

CHAPTER XXV.

THE CLAUSE "PRIVILEGE OF RESHIPPING."

Effect of the clause "privilege of reshipping," § 351.
"Privilege of reshipping in case of low water," § 352.
The privilege must be exercised in the customary way, § 353.
Effect of the clause on the second carrier's lien for freight charges, § 354.

§ 351. The privilege of transshipment reserved to a common carrier in his bill of lading does not discharge him from any liability which is incident to his contract until the goods be delivered at the destined port. Such stipulation is for his benefit. It continues his liability, but throws upon the owner any increase of expense.[1] Where a bill of lading said, "with privilege of reshipping on any good boat," it was held that the master did not lessen his liability by reshipping the goods, but was responsible for their delivery, unless the loss was by the unavoidable accidents of the river. It was necessary for him to prove that the second boat was a good one. If a common carrier attempts to perform his contract in a manner different from his undertaking, he becomes an insurer for the absolute delivery of the goods and cannot avail himself of any exceptions made in his behalf in the contract.[2] In Hirsch *v.* Leathers,[3] Mr. Justice Taliaferro, said: "The privilege of transshipment stipulated by the carriers, by no means exonerates them from the obligation to deliver the goods at the point named in the contract of affreightment. They were bound in reshipping to employ a seaworthy vessel and, as to their liability, the second vessel is considered as much theirs as the first."

§ 352. Where the bill of lading for goods carried on a steam-

[1] Whitesides *v.* Russell, 8 W. & S. (Pa.) 44; Little *v.* Semple, 8 Mo. 99; Cox *v.* Foscue, 37 Ala. 505; Propeller Mohawk, 8 Wallace, 153; Tio *v.* Vance, 11 La. 199; Cassilay *v.* Young, 4 B. Mon. (Ky.) 265.

[2] Dunseth *v.* Wade, 3 Ill. 285.

[3] 23 La. Ann. Rep. 50.

boat says, "with privilege of reshipping in case of low water," the clause is a privilege reserved to the boat and not a duty imposed upon it. It has a right to continue and complete the voyage when the obstacle is removed, without taking advantage of the privilege.[1] Where a steamboat contracted to carry certain merchandise from New Orleans to Shreveport, "with the privilege of reshipping," and the river was so low that she was unable to proceed all the way, it was held that there was an implied obligation to reship, if she could not get up the river within a reasonable time.[2] In a case where the bill of lading said, "in case the whole or any part of the goods specified herein be prevented by any cause from going in said ship, the ship owner is only bound to forward them by succeeding ships of the same line," the court did not decide whether or not this referred only to cases when, for some reason, transshipment becomes necessary after the goods had been originally loaded, but said that at least sufficient cause must be shown.[3]

§ 353. Where the privilege of reshipping is reserved in a bill of lading, the carrier must exercise the privilege in the usual and customary manner. In the case of Warren *v.* Henderson,[4] the whole question of negligence and want of care imputed to the defendants turned upon the point as to whether they were justified in transshipping from a steamer into a sailing craft instead of into another steamer, the plaintiff contending that a steamer would have more easily escaped the effects of the tempestuous weather. The goods had been transshipped into a sailing vessel, which, with them on board, was lost in a storm. By the bill of lading it was agreed that transshipment should take place at Kingston. The court said: "The defendants have proved by three witnesses, conversant with the usages of the forwarding business at Kingston, that it is usual to transship at Kingston goods intended for Chicago and other western ports, and that sailing vessels are generally used for the

[1] Sturgess *v.* Steamboat Columbus, 23 Mo. 230.

[2] Hatchett *v.* Steamer Compromise, 12 La. Ann. Rep. 783; White *v.* Steamer Kate Dale, 16 ib. 172; McGregor *v.* Kilgore, 6 Ohio, 361; Broadwell *v.* Butler, 6 McLean, 296; Carr *v.* Steamboat Michigan, 27 Mo. 196.

[3] Kirkpatrick *v.* Amer. S. S. Co., 2 Weekly Notes of Cases (Pa.), 308.

[4] 8 Lower Canada, 108.

conveyance of goods to the ports in the upper lakes. The river navigation may be said to terminate, and the lake navigation to commence, at Kingston. It is this that renders a change of craft there advantageous and the transshipment generally takes place in consequence of the change of craft. . . . . The defendants had a right under the bill of lading to transship the property entrusted to their care. They therefore had a right to transship that property in the usual mode at that time and as it is proved that they did so, I hold that they are not chargeable with negligence and that the non-delivery of the goods was not attributable to any fault on their part." The action was accordingly dismissed with costs.

Where a reshipment of goods is made by a common carrier without authority and they are afterwards lost, even by the act of the public enemy, he is liable.[1]

§ 354. Where the bill of lading says "with the privilege of reshipping," the second carrier is not the mere agent of the first. He has a lien on the goods for his proper remuneration and cannot be deprived of it by bad faith on the part of the first carrier.[2]

[1] G. & B. R. Nav. Co. *v.* Marshall, 48 Ind. 596.

[2] Walker *v.* Cassaway, 4 La. Ann. Rep. 19.

CHAPTER XXVI.

STIPULATIONS AS TO DEMURRAGE, ETC.

Stipulation as to the payment of demurrage in the bill, § 355.
Liability for demurrage where the bill contains no such clause, § 356.
Provision in a charter-party as to demurrage, § 357.
Construction of the phrases "charges" and "primage and average accustomed," § 358.

§ 355. Bills of lading sometimes contain express stipulations as to demurrage. In such a case the acceptance of the goods by the consignee is evidence of an agreement by him to pay demurrage as well as freight.[1] Thus in Jesson *v.* Solly[2] goods were shipped under a bill of lading providing that the "ship is to be cleared in sixteen days and eight pounds per day demurrage to be paid after that time." It was held that the consignee accepting delivery of the goods under such a bill of lading was liable to pay the demurrage. In Lake *v.* Hurd[3] a bill of lading provided that twenty-four hours after arrival at port and notice to the consignee there should be allowed for receiving the cargo at the rate of one day (excepting Sundays) for every hundred tons thereof, after which the consignee should pay demurrage for each day's detention. The cargo arrived on Sunday and the carrier on that day notified the consignee and was told to take his cargo to the railroad company's dock and there discharge, according to the rules of the dock, the requirement of the company and the custom of the port. This was the cheapest and quickest manner of unloading, but in so doing the carrier was subjected to detention. The consignee was held liable for the demurrage.

§ 356. Where the bill of lading contains no stipulation as to demurrage, the common law courts have usually held that the

[1] Allen *v.* Coltart, L. R. 11 Q. B. D. 782; Hall *v.* Eastwick, 1 Lowell, 456.

[2] 4 Taunt. 52.

[3] 38 Conn. 536.

consignee or his assignee is not liable for demurrage, although they have accepted the goods.[1] In England the rule has been changed by act of Parliament[2] and in the United States the admiralty courts have refused to follow the common law decisions.[3] In The Hyperion's Cargo[4] it was held that the master had a lien upon the cargo for demurrage, although demurrage was not expressly stipulated for in the bill of lading.

§ 357. Where a charter-party provides for demurrage, but no mention of it is made in the bill of lading, the assignee of the bill of lading is not liable for demurrage unless he has notice of the terms in the charter-party.[5]

§ 358. The word "charges" was held, in Huntly *v.* Dows,[6] not to include demurrage; but in C. & S. W. R. R. Co. *v.* N. W. U. Packet Co.[7] it was held to include salvage.

The words "with primage and average accustomed" do not require the payment of primage where none is payable by the custom of the port of shipment.[8]

[1] Gage *v.* Morse, 12 Allen (Mass.), 410; Young *v.* Moeller, 5 E. & B. 755; Chappell *v.* Comfort, 8 Can. Law Jour. (O. S.) 138; Miner *v.* N. & W. R. R. Co., 32 Conn. 91.

[2] Smurthwaite *v.* Wilkins, 11 C. B. (N. S.) 842.

[3] Sprague *v.* West, Abb. Adm. Rep. 548; R. R. Co. *v.* Northam, 2 Ben. 1; Huntly *v.* Dows, 55 Barb. 310; Robbins *v.* Welsh, 9 Phila. (Pa.) 409; Van Etten *v.* Newton, 25 N. Y. St. Rep'r, 751; Pietro G., 38 Fed. Rep. 148.

[4] 2 Lowell, 93.

[5] Oliver *v.* Muggeride, 5 Can. Law Journ. (O. S.) 166; Carr *v.* Austin, etc., R. R. Co., 4 Wood, 327.

[6] 55 Barb. (N. Y.) 310.

[7] 38 Iowa, 377.

[8] Vose *v.* Morton, 5 Gray (71 Mass.), 594.

CHAPTER XXVII.

STIPULATIONS AS TO PAYMENT OF FREIGHT.

Effect of stipulations in the bill as to lien for "freight," § 359.
The clause "freight charges paid through" does not deprive the last carrier of his lien, § 360.
Lien for freight is lost if the goods are injured by the carrier's negligence, § 361.
Goods of one shipper are not liable for charges on the goods of another, though shipped under the same bill, § 362.
Freight—person to whom payable, § 363.
Freight—person by whom payable, §§ 364, 365, 366, 367, 368.
"He (the consignee) paying the freight," and similar clauses, § 369.
"Delivery upon payment of freight," § 370.
Refusal to give a bill unless freight be previously paid, § 371.
Freight—amount due, § 372.
Freight payable upon "net weight delivered," § 373.
A promise to pay reasonable freight is implied by law, § 374.
Right to set off damages against a claim for freight, § 375.
Freight for goods delivered short of destination, § 376.
Freight for goods underclassed by the shipper, § 377.
Freight—when due, §§ 378, 379.
Specific stipulations contained in the bill, judicially construed, §§ 380, 381.

§ 359. Common carriers have a lien for freight on the goods which they have carried. The bill of lading may be so expressed as to affirm the existence of the lien, or to extend or modify it, or to exclude it altogether.[1] Thus the parties may agree that the goods, when they arrived at the port of destination, shall be deposited in the warehouse of the consignee or owner and that such a deposit shall not be regarded as a waiver of the lien.[2] Where it is stipulated that the goods are to be

[1] The Bird of Paradise, 5 Wall. 545; Chase *v.* Westmore, 5 M. & S. 180; Tate *v.* Meek, 8 Taunt. 280; Lucas *v.* Nockells, 4 Bingham, 731; Alsager *v.* Dock Co., 14 M. & W. 798; Bags of Linseed, 1 Black, 112; Goodman *v.* Stewart, Wright, (Ohio), 216; McLean *v.* Fleming, L. R. H. L. (Sc. App.) 128; Webb *v.* Anderson, Taney, 504.

[2] The Eddy, 5 Wall. 481.

delivered at the port of discharge before the freight is paid and without any conditional qualification, the lien of the ship-owner for the payment of the freight is waived.[1] If the payment of the freight is to be concurrent or simultaneous the lien exists in full force. In "The Volunteer"[2] Mr. Justice STORY said: "The right of lien for freight does not absolutely depend on any covenant to pay freight on delivery of the cargo; but it may exist if it appears that the payment was to be made in cash or bills before or at the delivery of the cargo, or even if it does not appear that the delivery of the cargo is to precede such payment." In that case it was held that the stipulation that the freight should be paid within ten days after the vessel returned to the port of departure did not displace the lien, as the delivery of the cargo might be rightfully postponed beyond the ten days after the return of the ship.

§ 360. The lien for freight exists in favor of the final carrier, although the first carrier has given a receipt saying "freight charges paid through," if in fact he receives the goods without knowing this and only a part of his charges have been paid.[3] Where goods are erroneously billed by the first carrier acting as the shipper's agent and so carried to a wrong place, the last carrier, having advanced previous charges, has a lien therefor and for the freight earned.[4]

§ 361. Freight and of course the lien therefor, are lost if the bill of lading stipulates for the delivery of the goods in like good condition as when received and they are injured by the negligence or want of skill of the carrier.[5]

§ 362. One person's goods cannot without his consent be made liable for charges for the goods of another, even though they are shipped under the same bill of lading.[6] In Leaf *v.* Canada Shipping Company,[7] the question was as to the liability

[1] The Volunteer, 1 Sumner, 551; The Bird of Paradise, 5 Wall. 545.

[2] 1 Sumner, 551. See How *v.* Kirchner, 4 Can. Law Jour. (O. S.) 121.

[3] Wolf *v.* Hough, 22 Kansas, 659; Gracie *v.* Palmer, 8 Wheaton, 605.

[4] Briggs *v.* B. & L. R. R. Co., 6 Allen (88 Mass.), 246.

[5] Humphreys *v.* Reed, 6 Wheaton, 435.

[6] Hale *v.* Barrett, 26 Ill. 195; Bishop *v.* Empire T. Co., 33 N. Y. Superior Court, 99.

[7] 1 Legal News, 218 (Canada).

of goods to the carriers, not for the freight thereon, but for a previous debt of the intermediate shipping agents. The carriers (in this instance, the Canada Shipping Company) claimed a lien on certain goods for a debt due to them by the agents through whom the goods were shipped. The bill of lading stipulated that "the owners or agents of the line have a lien on the goods, not only for freight and charges herein, but for all previously unsatisfied freights and charges due to them by the shipper or consignee." The freight claimed from the plaintiffs and paid by them under protest, was not due for goods owned or shipped by them at all, but which had been shipped by the same agents for other parties. The court held that in the absence of specific proof of a particular mode of dealing between the plaintiffs and the defendants, the former could not be held liable for the debt of other people, under the stipulations of the bill of lading.

The carrier's lien for freight and charges is not invalid because he claims more than is due.[1]

§ 363. The master of a vessel is usually entitled by the terms of the bill of lading to receive the freight money and he has the right to retain the goods until it is paid.[2] The master of a ship has no power, under his general authority, to draw bills of lading making the freight payable to any other than the owner. In Reynolds *v.* Jex,[3] a ship was chartered out and home for a lump sum, bills of lading to be signed by owner or agent at any rate of freight without prejudice to the charterer. At an outward port, the agents of the charterers advanced money to the master for the ship's use, on condition of the ship taking goods on the return voyage under bills of lading making the freight payable to them (the agents) or their assigns at the port of delivery. Goods were put on board and bills of lading given accordingly by the master. It was held that the master had no authority to make such bills of lading and that the ship-owner retained his lien on the goods for freight. When there is added, at the carrier's request, to the usual clause relating to the payment of freight by the consignee, a stipulation that it shall be paid to a third person, as for instance,

[1] Hoyt *v.* Sprague, 61 Barb. (N.Y.) 497; B. & L. H. Ry. Co. *v.* Gordon, 16 U. C. Q. B. 283.

[2] Lewis *v.* Hancock, 11 Mass. 72; Keith *v.* Murdock, 2 Washington, 297.

[3] 34 L. J. Q. B. 251.

"freight payable to A. B.," A. B. must be on hand to receive it. If he is not present, and the goods are delivered to the consignee, who subsequently fails, the carrier cannot recover his freight from the shipper.[1]

§ 364. Whoever receives cargo from a vessel under a bill of lading, in the absence of circumstances showing a different understanding, is liable for the freight.[2] In Phila. and Reading R. R. Co. *v.* Barnard,[3] a cargo of coal was shipped, deliverable to the shippers or their assigns. Before its delivery from the vessel it was sold to one B. who received part of it, paid to the owners of the vessel freight on what he received and refused to receive any more. The rest was then sold to respondents, who received no indorsement or delivery of the bill of lading, but received the coal from the vessel, gave a receipt for it upon the captain's bill of lading and gave B. two notes, one for the price of the coal and one for the freight, which B. agreed to see paid, but which he failed to pay and died insolvent. It was held that the respondents were liable to the owners of the vessel for the freight on the coal which they received. In Hatch *v.* Tucker,[4] A. loaded B.'s vessel with coal consigned to C. A dispute arising between A. and the master of the vessel as to a charge made by A. for trimming the cargo, the master refused to sign the bill of lading and sailed without doing so. The coal was accepted by C. It was held that C. was liable for the freight and could not deduct the charge made by A. In Ferguson *v.* Domville,[5] the shipper sent the bill of lading to a party without indorsing it to him. The carrier refused to deliver the goods although he tendered freight, unless he procured an indorsement. The holder regained possession by replevin. The carrier then brought an

[1] Thomas *v.* Snyder, 3 Wright (Pa.), 317.

[2] Merian *v.* Funck, 4 Denio (N. Y), 110; Shaw *v.* Thompson, Olcott, 144; Fowler *v.* Meikelham, 7 Lower Canada (Q. B.), 367; Abbe *v.* Eaton, 51 N. Y. 411; McGrevy *v.* Rathbone, 11 Upper Canada (C. P.), 186; Perret *v.* Sauvinet, 2 La. Ann. Rep. 559; Shackleford *v.* Wilcox, 9 ib. 33; Davison *v.* City Bank, 57 N. Y. 81; Canfield *v.* Northern R. R. Co., 18 Barb. (N. Y.) 586; Weguelin *v.* Cellier, L. R. 6 H. L. 286.

[3] 3 Ben. 39.

[4] 12 R. I. 501.

[5] 3 P. & B. (N. B.) 576.

action against him for the freight, which he had then refused to pay. It was held that a contract to pay the freight might be implied from the circumstances.

§ 365. Where the consignee before delivery of the goods indorses the bill of lading to other parties, who receive the property, the consignee is not liable for the freight.[1] If, however, the person to whom the bill of lading is indorsed is a mere agent for the consignee, the consignee cannot relieve himself of liability for the freight, without the consent of the carrier. In Lewis *v.* McKee,[2] an action was brought by ship owners against a consignee for freight. It appeared that before the ship arrived, the consignee indorsed the bill of lading to W. & K., wharfingers, but not so as to pass the property. The indorsement was as follows: "Deliver to W. & K., or order, looking to them for all freight, dead freight and demurrage, without recourse to us." The plaintiffs delivered the goods to W. & K. It was admitted that the defendant would have been liable to W. & K. for any freight paid by them. The court held that as the defendant was at the time of the alleged indorsement liable for the freight, he was bound to prove an assent of the plaintiffs to his discharge from that liability.

§ 366. The assignee of a bill of lading for value, who receives the property mentioned in it, is liable for the freight. In Trask *v.* Duvall,[3] Mr. Justice WASHINGTON in charging the jury, said: "The assignee of a bill of lading, for a valuable consideration, who receives the property mentioned in it, is liable to the owner of the ship for the freight. This arises from the terms of the bill of lading, which contains an engagement by the master and the shipper, to deliver the goods to the consignee, or to his assigns, he or they paying freight for the same. The consignee is not bound to receive them; but if he does receive them, he makes himself a party to the contract, and the law raises a promise on his part to perform the condition on which alone the delivery was to be made to him. The engagement of his assignee is precisely the same. The delivery is to be to him, he paying freight."

[1] Merian *v.* Funck, 4 Denio (N. Y.), 110;

[2] L. R. 2 Exch. 37. S. C. L. R. 4 ib. 58.

[3] 4 Washington, 181.

§ 367. Where, however, the assignees of the bill of lading are merely the agents of the owners of the cargo, they are not personally liable to pay the freight in the absence of an agreement to the contrary.[1] In Ackerman *v.* Redfield,[2] which was an action for freight against an intermediate consignee, not named in the bill of lading except in the direction for delivery, the court said, "It is not the mere receipt of goods by a person who is not the owner with the knowledge that they are subject to a charge of freight that will bind him to pay it; but if he receives the goods in pursuance of a bill of lading, making the payment of freight a condition precedent to the delivery, or if he has notice from the master that if he takes the goods, he must take them subject to the charge, he will be liable to pay it. But a person who is only agent for the consignee, and who is known to the master to be acting in that character, does not make himself personally answerable for the freight by receiving the goods." Dart *v.* Ensign[3] was an action for freight against an intermediate consignee, an agent of the owner to receive the goods for the carrier and to forward them to their ultimate destination. He had no property in the goods, no agreement by him to pay the freight was shown, no claim was made upon him by the plaintiff, nor was any notice given of any claim or lien. The bill of lading consigned the property to the care of the defendant for the owner and the agency was known to the carrier. The defendant was not liable for the freight and no promise to pay it was implied from the bill of lading.

§ 368. The original shipper of goods under an ordinary bill of lading remains liable to the master of the vessel for the freight earned, though the latter delivers the goods to the consignee, without exacting payment thereof; and this, even where the consignee offers to pay the freight and the captain refuses to receive it.[4] If the master "sees fit to waive the right of

[1] Elwell *v.* Skiddy, 77 N. Y. 282.

[2] 9 Hun (N. Y.), 378; Bickford *v.* Herr, 18 Lower Canada, Juris. (Q. B.) 169.

[3] 47 N. Y. 619.

[4] Gilson *v.* Madden, 1 Lansing (N. Y.), 172; Jobbitt *v.* Coundry, 29 Barb. (N. Y.) 509; Blanchard *v.* Page, 8 Gray (Mass.), 281; McEwen *v.* J. M. & I. R. R. Co., 33 Ind. 369.

lien and to deliver the goods without payment of the freight, his right to resort to the shipper for compensation still remains."[1]

§ 369. It has been held that where a bill of lading contains the clause "he (the consignee) paying the freight" or that the goods be delivered "on presenting this receipt and payment of the freight," that this is introduced for the benefit of the carrier and does not exempt the consignor from liability.[2] In Collins *v.* Union Trans. Co.,[3] a bill of lading contained the clause "we promise to deliver to A. and B., upon presenting this receipt and payment of freight, etc." The consignors paid A. and B. the amount of the freight and they failed before paying the carrier, who then sued the consignors. It was held that the carrier was entitled to recover the amount of freight from the consignors and that the proviso for payment was not for the latter, but for the carrier's benefit. In Barker *v.* Havens,[4] the owner of goods shipped them to Liverpool, the bill of lading saying, "to be delivered to C. B. & Co., they paying freight for the same, etc." The master delivered the goods at Liverpool without receiving the freight from the consignee, who afterwards refused to pay it. An action was held maintainable against the consignor therefor,—the clause in the bill being simply for the benefit of the carrier. In Thomas *v.* Snyder,[5] a shipper consigned coal to D. or his assigns, "he or they paying the freight for the said coal," directing in the bill of lading, at the request of Thomas, the owner of the vessel in which the coal was shipped, "freight payable to P. D. Thomas." Then the coal was delivered to the assigns of D., who were at the time willing and able to pay the freight. Neither Thomas nor his agent, nor any one for him, was present to receive it and by the subsequent failure of the assignees it was lost. In an action by Thomas against the shipper of the cargo, to recover the freight, it was held that it was not error in the court to instruct the jury that if they found these facts, their verdict should be for the defendant, the court saying, by Mr. Justice WOODWARD, "that a party who insists on such a stipulation in

[1] Worster *v.* Tarr, 8 Allen (Mass.), 270.

[2] Layng *v.* Stewart, 1 Watts & Sargeant (Pa.), 222.

[3] 10 Watts (Pa.), 384.

[4] 17 Johnson (N. Y.), 234.

[5] 3 Wright (Pa.), 317.

a bill of lading should be at hand or should appoint some one to receive the freight at the proper time and place for its payment is not, we think, an unreasonable rule of law."

Where the shipper is impliedly bound from the face of the bill to pay the freight of goods, it is allowable to show that the owner of the boat received them under an agreement with a third person to pay the freight, when the latter has paid it.[1]

§ 370. Where a bill of lading says "we promise to deliver to A. and B., upon presenting this receipt and payment of freight," etc., this proviso for prepayment is not for the consignor, but for the carrier's benefit and if the consignees fail to pay the consignor must do so.[2] The usual clause in a bill of lading making the payment of freight by the consignee a condition of the delivery of the goods, is inserted for the benefit of the carrier.[3]

§ 371. In the English case of Green *v.* Sichel,[4] the carrier refused to give a bill of lading or other document giving evidence of the goods being on board his ship unless the freight were previously paid. Though this was not one of the points decided, yet the carrier's action seems to have been acquiesced in as legal and proper.

§ 372. As a general rule where the amount of the freight is specified in the bill of lading, no greater amount can be demanded for the transportation of the goods. In the case of the "406 Hogsheads of Molasses,"[5] a libel *in rem* was filed against certain hogsheads of molasses, to recover freight under a charter party. The vessel was chartered by Gordon for a specified sum. P. shipped certain molasses, which he had sold to Gordon. The bill of lading therefor was signed by the master, providing for delivery to the order of P., at a specified rate of freight and contained at its foot the words, "Without prejudice to charter party." Afterwards R. advanced, on the security of the bill of lading, money to take up the drafts drawn on Gordon for the price of the molasses

[1] Wayland *v.* Mosely, 5 Ala. 430.

[2] Collins *v.* Union Transp. Co., 10 Watts (Pa.), 384.

[3] Canfield *v.* Northern R. R. Co., 18 Barb. (N. Y.), 586.

[4] 7 C. B. (N. S.) 747; 6 Jur. (N. S.) 827; 29 L. J. (C. P.) 213; 8 W. R. (C. P.) 663.

[5] 4 Blatch. 319.

and took an assignment of the bill of lading. It was held that the molasses was liable only for the freight specified in the bill of lading.

Dray tickets were by mistake signed for a shipper's goods at 30 cents per hundred by a steamboat clerk and on his refusal to sign bills of lading at the same rate, the shipper demanded to have the goods put on shore. The carrier refused and went on and transported them to destination. This action of the carrier was held to be an assent or agreement by it to transport at the rate of 30 cents per hundred and it was not entitled to recover more than that amount.[1]

§ 373. Where freight is by the bill of lading payable at a certain rate per ton, "nett weight delivered," the carrier has no right to demand freight upon the amount named in the bill of lading, larger than the quantity actually delivered.[2]

§ 374. It is not necessary that the freight to be paid be expressed in the bill. A promise on the part of the shipper to pay reasonable freight is implied in law.[3] In Holford *v.* Adams[4] an express company carried a package containing $40,000 of bonds. On arriving at the place of destination it refused to deliver the bonds except on payment of $400, one per cent. of the value of the package. It was held that under the terms of the contract, whereby the carrier was not to be liable for loss or damage, except so far as due to fraud or gross negligence, there was no reason for enhancing the charge in proportion to the value of the articles transported and this charge was *prima facie* unreasonable. It could not be justified by proof of a usage, not general, but of this carrier only.

§ 375. A bill of lading provides that the carrier is to carry and deliver in good order and if the goods conveyed are damaged, the consignee may withhold the amount out of the price to be paid as freight.[5] Against a claim for freight the consignee may set up a counter claim for damages for non-delivery of the residue of the quantities specified in the bill of lading and not

[1] Wood *v.* Str. Fleetwood, 27 Mo. 159.

[2] Coulthurst *v.* Sweet, 1 L. R. C. P. 649.

[3] Gray *v.* Mo. River Packet Co., 64 Mo. 47.

[4] 2 Duer (N. Y.), 471.

[5] Boggs *v.* Martin, 13 B. Mon. (Ky.) 239; Libby *v.* Gage, 14 Allen (Mass.), 261; The Tangier, 32 Fed. Rep. 230.

actually received.[1] In England, a consignee of goods, or an indorsee of a bill of lading, has no right to have the value of missing goods deducted from the freight payable, in respect of the goods delivered and no custom of merchants inconsistent with this rule, or law of a foreign country making an allowance in such a case by way of set-off, will be recognized.[2]

§ 376. Where goods are shipped at an agreed price of freight and part are delivered, at defendant's request, at a point short of destination, but without any waiver by the carrier of his claim for full freight, the defendant is liable for the full freight, as much as if the goods had been carried to the original point of destination.[3]

§ 377. Where goods are shipped as of an inferior class, but are really of a superior class, the carrier is entitled to recover the usual rate for the superior class.[4] Thus where sewing-machines were shipped as "hardware," it was held that when the true character of the goods was discovered, the railroad agent had the right to bill them truly and charge the freight at the higher rate authorized by the company's regulations.[5]

§ 378. Under an ordinary bill of lading, freight is only demandable by the owner, master, or consignee of the ship when they are ready to deliver the goods in the like good order as they were when they were received on board the ship[6] and freight can only be demanded when the goods are discharged from the vessel and the consignee has had a reasonable opportunity to examine into their condition.[7]

Neither the carrier nor the consignee can require that goods

[1] Byrne *v.* Weeks, 4 Abb. Dec. (N. Y.) 657; Hinsdell *v.* Weed, 5 Denio (N. Y.), 172.

[2] Mayer *v.* Dresser, 10 Can. L. J. (O. S.) 308; Mayer *v.* Dresser, 16 C. B. (N. S.) 646; Allen *v.* Chisholm, 33 Upper Canada, Q. B. 237; The Norway, 8 Moore P. C. C. (N. S.) 245.

[3] Ellis *v.* Willard, 9 N. Y. 529.

[4] Rice *v.* Indianapolis, etc., R. R. Co., 3 Mo. Appeal Rep. 27.

[5] Sumner *v.* Southern R. R. Ass., 7 Baxter (Tenn.), 345.

[6] Brittan *v.* Barnaby, 21 Howard, 527; The Velona, 3 Ware, 139; Humphreys *v.* Reed, 6 Wharton (Pa.), 435; Thomas *v.* Snyder, 3 Wright (Pa.), 317; Rowland *v.* Miln, 2 Hilt (N. Y.), 150; Gauche *v.* Storer, 14 La. Ann. Rep. 411.

[7] Vitrified Pipes, 14 Blatch. 274; Black *v.* Rose, 2 Moore P. C. (N. S.) 277; Certain Logs of Mahogany, 2 Sumner, 589.

shipped under one bill of lading shall be divided and delivered in parcels on separate payment of freight for each parcel.[1]

The owners of a vessel can recover on an implied assumpsit against the consignee named in the bill of lading on his receiving the property shipped. If a part of the property be lost in the course of the voyage and the consignee accept the residue, he becomes liable to pay freight *pro rata*, but may recoup the damage for property not delivered in an action against him for freight. If, however, the directions of the consignors to the consignee, as contained in or annexed to the bill of lading, be to pay freight only on delivery of all the property shipped, the delivery of the whole will be a condition precedent to the recovery of freight against the consignee, though he receive and accept a part.[2]

§ 379. If a bill of lading stipulates that the freight is earned whether the goods arrive or not, the shippers are liable for the freight;[3] and the master is entitled to full freight on all the goods laden and borne on the bill of lading, though they may be by natural causes and without his fault, diminished in quantity when delivered.[4]

Although freight is not payable in respect of a man's own goods conveyed in his own ship, it becomes so if he makes third persons, who have advanced him money, the consignees of the goods and the goods are by the bill of lading deliverable to the order of such persons.[5]

§ 380. In the following cases certain peculiar provisions in bills of lading in reference to freight are considered. In Krall *v.* Burnett,[6] "freight payable in London" means that it is payable there and not elsewhere and has no reference to the time of payment. Evidence is not admissible to explain the phrase so as to make it by custom mean "freight payable in advance in London." In Jones *v.* Hoyt,[7] a bill of lading of lumber

[1] Vitrified Pipes, 14 Blatch. 274; Brittan *v.* Barnaby, 21 Howard, 527.

[2] Hinsdell *v.* Weed, 5 Denio (N. Y.), 172; The Nathaniel Hooper, 3 Sumner, 512; Perkins *v.* Hill, 1 Sprague, 123.

[3] Murray *v.* Head, 3 Legal News (Canada), 47.

[4] Steelman *v.* Taylor, 3 Ware, 52.

[5] Weguelin *v.* Cellier, L. R. 6 H. L. 286.

[6] 25 W. R. 305.

[7] 23 Conn. 157.

contained a provision that the lumber should be measured and piled on deck at the port of delivery. Part of it was unloaded and measured on the wharf. Notwithstanding this breach of stipulation, the carrier was entitled to freight. The stipulation was not a condition precedent, but merely an agreement for convenience, and in view of the consignee's death before arrival, and the failure of his representatives to accept the goods, it became unimportant.

§ 381. In Davison *v.* Gwynne,[1] the master of a vessel covenanted with a freighter that the vessel should proceed with the first convoy from England for Spain and Portugal, or either, as he should be directed by the freighter or his agents, and there make a right and true delivery according to the bills of lading signed for the same, etc. The freighter first ordered the master to proceed to Lisbon, in consequence of which he took in goods and signed bills of lading for that port. It was held that sailing with the first convoy was not a condition precedent to the recovery of freight by the master, and that the master was entitled to recover freight as upon a right and true delivery of the cargo, agreeably to the bills of lading, upon proof of having delivered the entire number of chests, etc., called for by the bills, though it appeared that their contents were damaged by negligence, the injured party having his remedy by action for such negligence. In Murphy *v.* Creighton,[2] a carrier company contracted to ship a certain party's goods to certain points at rates "same as lowest to points named." It was held that the fair construction of this is that the rates to each point were to be as low as the lowest to that point and not, for example, that said party should have rates to the most distant one as low as the lowest rates for some one else to a nearer point.

In Southern Ex. Co. *v.* Womack,[3] the fact that freight was to be paid in Confederate money, an illegal currency, would not affect the carrier's liability for loss or failure to carry.

[1] 12 East, 381 (K. B.).

[2] 45 Iowa, 179.

[3] 1 Heiskell (Tenn.), 256.

CHAPTER XXVIII.

STIPULATIONS RELATING TO DELIVERY—GOODS SHIPPED C. O. D.—CLAIM FOR LOSS WITHIN LIMITED TIME.

Carrier's duty under a bill for goods shipped "C. O. D.," §§ 382, 383, 384, 385.
Claim for loss to be made within a limited time, §§ 386, 387, 388.
Effect of a notice on the back of the carrier's receipt, § 389.
Claim to be made before the removal of the goods, § 390.
Claim to be made at a particular office, § 391.
Claim for non-delivery is not covered by "loss or damage," § 392.
Claim to be made in thirty days held to be a reasonable limitation, § 393.
Consideration of the clause limiting time for claim, in England, § 394.
Consideration of clauses of similar import, §§ 395, 396.

§ 382. WHERE goods are sent "C. O. D." the carrier has no right to deliver them to the consignee till they are paid for.[1] The consignee is entitled to a reasonable opportunity to inspect before accepting them and the carrier may afford him reasonable facilities for doing so without making himself chargeable for the price, even if he put them into the hands of the consignee for that purpose and receive from him the price as personal security to the carrier that the goods shall be returned, if not accepted, after a reasonable opportunity to examine them.[2] The shipper may, however, stipulate that there shall be no inspection of the goods before delivery and payment.[3] The letters "C. O. D." have acquired in the commerce of the country such a fixed and determinate meaning that courts and juries, from their general information, will readily understand them, but parol evidence is admissible to prove their meaning.[4] Where goods are marked "C. O. D." the contract of the carrier in connection therewith is not only for the safe carriage and delivery of the goods to the consignee but he further contracts

[1] Weed *v.* Barney, 45 N. Y. 344.
[2] Lyons *v.* Hill, 5 Am. Law Reg. (N. S.) 698.
[3] Wiltse *v.* Barnes, 46 Iowa, 210.
[4] Am. Ex. Co. *v.* Lesem, 39 Ill. 312.

with the consignee that he will collect on delivery and return to the consignee, the charge. If the carrier, on such a contract, returns neither the goods nor the charges thereon to the consignor, the latter may sue him.[1]

§ 383. Where goods were sent to be delivered on payment of $1665 and were delivered without payment, the carrier was held liable for what was not paid by the consignee. It made no difference that $1665 were more than the amount coming to consignor, nor would it have made any difference whether or not said sum had anything at all to do with the price of the goods. The carrier had no interest therein except to see that the condition was complied with.[2] Where a bill of lading says "charges to be collected, $274.40," its plain and reasonable intent is that the charges are to be collected by the carrier and if he delivers the goods without doing so, thereby surrendering a security without authority, he is liable for the charges he assumed to collect.[3]

§ 384. An express company carried a box "C. O. D." and received from the consignee the sum charged. The box, on being opened, proved worthless—a bald swindle. The money was returned to the consignee. It was held that if by reason of the fraud of the consignors the consignee becomes entitled to recall the payment he has made to the agent for the use of his principals (the consignors), he may recall it upon notice to the agent if the latter has not paid the money over to his principals and no change has taken place in his situation before such notice. It is clearly the duty of the express agent to pay back the money on discovery of the fraud. If the transaction is on the part of the consignors a bald and naked swindle, the law

[1] U. S. Express Co. *v.* Keefer, 59 Ind. 263; Owen *v.* Johnson, 2 Ohio St. 142; American Merch. Union Ex. Co. *v.* Wolf, 79 Ill. 430; Am. Ex. Co. *v.* Greenhalgh, 80 ib. 68; Am. Ex. Co. *v.* Lesem, 39 ib. 312; Hutchings *v.* Ladd, 16 Mich. 493; Collender *v.* Dinsmore, 55 N. Y. 200; Pilgreen *v.* State, 71 Ala. 368; Van Winkle *v.* Adams Ex. Co., 3 Robertson, 59; Am. Merch. Union Ex. Co. *v.* Schier, 55 Ill. 140; Brooks *v.* Am. Ex. Co., 14 Hun (N. Y.), 364; Wareham Bank *v.* Burt, 5 Allen (Mass.), 113; Am. Ex. Co. *v.* Wettstein, 28 Ill. App. 96.

[2] Steamboat John Owen *v.* Johnson, 2 Ohio State, 142.

[3] Meyer *v.* Lemcke, 31 Ind. 258.

will lend no aid in the collection of money for the satisfaction of such a claim.[1] Where the carrier sells the goods carried at their destination and brings back the proceeds, the original contract of carriage applies to the return voyage.[2]

§ 385. Where goods are entrusted to a common carrier, accompanied by a bill and instructions not to deliver the goods unless paid for by the consignee, he is liable to the consignor for a delivery without exacting payment. By thus assuming to act with the goods as his own, he is answerable for their value, but he may discharge himself from liability by procuring their return. An indorsement upon the bill, "Please collect the bill," is a mere request with which the carrier may or may not comply and is not of itself sufficient evidence of an undertaking or agreement on his part not to deliver the goods unless paid for.[3]

§ 386. A clause is frequently inserted in bills of lading restricting the time when, and fixing the place where, claims for loss are to be made to the carrier. In the case of the Express Company *v.* Caldwell[4] it was held by the Supreme Court of the United States that a condition imposed by an express company that it shall not be liable for any loss or damage to a package unless claim therefor shall be made within ninety days from the time of its receipt by the company, is lawful and binding and is not unreasonable where the time of the transit of the package is only one day. The claim should be made within ninety days, but the suit may be brought at any time within the statute of limitations. Mr. Justice STRONG, in delivering the opinion of the court, says: "A common carrier is responsible for his negligence, no matter what his stipulations may be; but an agreement that, in case of failure by the carrier to deliver the goods, a claim shall be made by the bailor or by the consignee within a specified period, if that period be a reasonable one, is altogether of a different character. It contravenes

[1] Herrick *v.* Gallagher, 60 Barbour (N. Y.), 566.

[2] Harrington *v.* McShane, 2 Watts, 443.

[3] Hooker *v.* Gormer, 2 Hilt. (N. Y.) 71.

[4] 21 Wallace, 270. See also Swinburne *v.* Massue, Stewart's L. C. Rep. 569; Mason *v.* Grand Trunk Ry. Co., 37 U. C. Q. B. 163; Merrill *v.* Am. Exp. Co., 62 N. H. 514; Kaiser *v.* Hoey, 16 N. Y. St. Rep'r, 803.

no public policy. It excuses no negligence. It is perfectly consistent with holding the carrier to the fullest measure of good faith, of diligence and of capacity which the strictest rules of the common law ever required. And it is intrinsically just as applied to the present case. The defendants are an express company. We cannot close our eyes to the nature of their business. They carry small parcels easily lost or mislaid and not easily traced. They carry them in great numbers."

§ 387. Where it was agreed that damages to stock in transit should not be allowed unless notice in writing of a claim therefor should be given to the company at or before unloading the cattle and the plaintiff, knowing of an injury at the time, gave no notice for a year, it was held that the contract must be held good unless contrary to public policy. Unless the notice were given immediately it would be of no value to the carrier, therefore the time when it was to be given was not unreasonable.[1]

In Indiana, where a bill of lading stipulated that the carrier should not be liable for any loss unless the claim therefor should be made in writing at the office of shipment within thirty days from the date of the bill and the complaint filed in the case did not allege that the claim for such loss was so made, it was held that the stipulation that the claim should be made in writing within the time specified was reasonable and that in such a case it was not necessary to make the claim at the office of shipment. It might be made upon some agent or officer of the company chargeable with the loss.[2]

§ 388. A provision that carriers shall not be liable for loss or damage unless the claim therefor shall be presented to them in writing at their office within thirty days after the time when the property has or ought to have been delivered "is a very reasonable and proper provision to enable the defendants, while the matter is still fresh, to institute proper inquiries and furnish themselves with evidence on that subject. The defendants do a large business and to allow suits to be brought against them

[1] Goggin *v.* K. P. Ry. Co., 12 Kansas, 416.

[2] U. S. Ex. Co. *v.* Harris, 51 Ind. 127. In the same State in the earlier case of Adams Ex. Co. *v.* Reagan, 29 Ind. 21, it was held that the requirement that a claim for loss should be made within thirty days was unreasonable and void.

without such notice at any length of time would be to surrender them bound hand and foot to almost every claim which might be made. It would be next to impossible, where a thousand packages large and small are forwarded to them daily, to ascertain anything about the loss of one of them at a distance of six months or a year."[1] A stipulation that "no claim for deficiency, damage, or detention would be allowed unless made within three days after delivery of the goods nor for loss unless made within seven days from the time they should have been delivered," has been held reasonable.[2]

§ 389. Notice was placed on the back of a receipt for goods that the carrier should not be liable for loss or damage unless notice were given twenty-four hours after delivery of the goods and that after twenty-four hours from arrival storage would be charged. The goods remained several days and were damaged. In a suit it was held that the plaintiff was not bound by the notice although brought home to the shipper and that the defendant could not so limit his liability.[3]

In Alabama a different ruling has been made where a receipt given by a carrier stipulated that there should be no liability for loss unless the claim should be made in thirty days from the date of receipt in a statement to which the receipt should be annexed. The plaintiff was not informed of the loss for more than a year. The stipulation was held unreasonable, tending to fraud and inoperative and it was said that a common carrier cannot be allowed to make a statute of limitation so short as to be capable of becoming a means of fraud.[4]

§ 390. Where in consequence of the carrier's delay, horses in transit became ill, it was held that a clause requiring a demand for damages to be made before removal from the depot is in such circumstances unreasonable and void, as the extent of the illness could not be at once discovered.[5] A condition in a bill of

[1] Weir *v.* Express Co., 5 Phila. Rep. 355. See also Express Co. *v.* Hunnicutt, 54 Miss. 566.

[2] Lewis *v.* Great Western R. R. Co., 5 Hurlstone & Norman, 867.

[3] Brown *v.* Railway, 54 N. H. 535.

[4] Southern Express Co. *v.* Caperton, 44 Ala. 101. This case was adversely criticised by the U. S. Supreme Court in Express Co. *v.* Caldwell, 21 Wall. 270.

[5] Ormsby *v.* U. P. R. R. (U. S. C. C. Colorado), 4 Fed. Rep. 170.

a railroad company that all claims for damages should be made before the article was taken from the station, was held in North Carolina to be reasonable, but that it did not cover latent injuries.[1]

§ 391. A reservation in an express company's bill that all claims for damages were to be presented at the New York office for settlement, was held not to make such presentation of them a condition precedent to the company's liability. Their readiness at that office to adjust the loss went only in defence of interest and costs and not to the cause of action.[2]

§ 392. Where an express company gave a receipt for goods containing a clause exempting it "from any loss or damage whatever unless claim shall be made therefor within ninety days from the delivery" to it, it was held that the clause had no application to a suit against the company for the non-delivery of the goods themselves,—that not being either for "loss or damage."[3] Such a clause not being a condition precedent to the right to recover, but being rather in the nature of a limitation, cannot be availed of upon trial unless set up by the defendant in his answer.[4]

§ 393. A stipulation in the bill of lading that the carrier should not be liable for loss unless a written claim were presented in thirty days after date of contract, has been held reasonable.[5]

§ 394. The stipulation in a bill of lading "that claims for short delivery, if any, as well as every and all other claim or claims whatsoever against the vessel, must be made within three months from the date of this bill of lading, at the port of Calcutta, and at no other port and no such claim or claims will be entertained or admitted unless supported by certificates signed by the commander of the vessel before leaving the port of discharge," has in England been held to be a condition precedent to the institution of an action at the port of discharge, or elsewhere, for the recovery of damages for short delivery or

[1] Capehart *v.* Seaboard, etc., R. Co., 77 N. C. 355.

[2] Place *v.* Union Ex. Co., 2 Hilt. 19.

[3] Porter *v.* Southern Ex. Co., 4 S. C. 135.

[4] Westcott *v.* Fargo, 61 N. Y. 542.

[5] U. S. Ex. Co. *v.* Harris, 51 Indiana, 127. See Adams Ex. Co. *v.* Regan, 29 Ind. 21; Southern Ex. Co. *v.* Caferton, 44 Ala. 101.

non-delivery, or for injury to the cargo.[1] The stipulation makes it obligatory on the consignee or those claiming under him, to prefer his claim, or, in other words, to make a demand at the port, indicated in the clause, for payment before he can maintain his action for damages.[2] The consideration of the legality and effect of a clause, stipulating that the claim be made before the goods are removed, came before the courts of England for the first time in 1876, in the case of Moore *v.* Harris,[3] which was an appeal to the Privy Council from a judgment of the Court of Queen's Bench in Lower Canada. The clause in the bill of lading concerning the meaning of which the contention arose, was "no damage that can be insured against will be paid for, nor will any claim whatever be admitted unless made before the goods are removed." It was here said that a "shipowner may choose to say I will not be liable for any damage to an article of this kind unless a claim is made, so that it may be looked into and checked by my agents before the goods are removed from their control. And when a condition to this effect is found in a bill of lading expressed in language, which, in its ordinary and natural sense includes all damage, whether latent or not, can the courts undertake to say it is so unreasonable that the parties could not have meant what they said? No doubt this condition may bear hardly on consignees, but so also may the very large exception to the responsibility of the shipowner inserted in the body of this bill of lading. Certainly no reasons for narrowing the scope of the condition can be gathered from the general tenor of the instrument, which is manifestly framed throughout, with a view to exempt the shipowner (as far as could be foreseen) from liability for damage. It may be that this has been done to an unreasonable extent; but the plaintiffs are merchants and men of business and cannot be relieved from an improvident contract, if it really be improvident."

§ 395. The following condition in a bill of lading was held to be reasonable and binding on the holder of the bill: "The articles named in this bill of lading shall be at the risk of the owner, shipper, or consignee thereof, as soon as delivered from

[1] Mahomed Ismailjee *v.* B. I. S. N. Co., 9 Cal. W. Rep. C. R. 396.

[2] Ibrahim Moosum *v.* B. I. S. N. Co., 8 ib. 35.

[3] 45 L. J. P. C. 55.

the tackles of the steamer at her port of destination and they shall be received by the consignee thereof, package by package as so delivered, and if not taken away the same day by him they may at the option of the steamer's agent be sent to store or permitted to lie where landed at the expense and risk of the aforesaid owner, shipper, or consignee."[1] Where property carried under a bill of lading providing that notice of loss should be given in writing within three days, was lost, the Supreme Court of Missouri said: "We are not prepared to say that the failure of the plaintiff to make the claim in the manner designated would on that account alone deprive him of his right of action."[2] Where a carrier's receipt said: "Consignees . . . . are requested to notice any errors . . . . within twenty-four hours or the company will consider their liability as ended;" it was held that "errors" must mean mistakes such as would be obvious on external inspection or comparison with the bill of lading. A consignor is not estopped by such a receipt and lack of notice from suing the carriers for the consequences of its negligence in transportation.[3]

§ 396. In a Canada case,[4] it was held that the plaintiff, not having given written notice of loss or damage within twenty-four hours after delivery according to the terms of the bill of lading under which some of the goods were shipped, could not recover in respect to said goods. A carrier cannot limit his legal liability by any notice, by publication or entry on receipts for goods, or on tickets sold, but may make an express contract with the shipper requiring a claim for loss or damage to be made within a limited time.[5]

[1] The Santee, 2 Ben. 519.

[2] Oxley *v.* S. L., K. C. & N. Ry. Co., 65 Mo. 629.

[3] Sanford *v.* Housatonic R. R. Co., 65 Mass. 155.

[4] Kyle *v.* B. & L. H. Ry. Co., 16 U. C. C. P. 76.

[5] South. Ex. Co. *v.* Barnes, 36 Ga. 532.

CHAPTER XXIX.

THE BILL IN ITS RELATION TO THE DELIVERY OF GOODS TO THE CONSIGNEE.

Surrender of the bill before the delivery of the goods, § 397.
Effect of custom on the delivery of the goods, §§ 398, 399.
Wharf delivery by a vessel, §§ 400, 401, 402, 403, 404, 405, 406.
Wrong delivery by a vessel, §§ 407, 408, 409.
Delivery by a carrier on land, § 410.
Place of delivery, § 411.
Time of delivery, § 412.
Acceptance by the consignee, § 413.
The person to whom delivery is to be made, § 414.
Effect of marks on the goods upon the stipulations in the bill, § 415.

§ 397. A CLAUSE requiring the presentation to the carrier of bills of lading, properly indorsed, as the evidence on which the delivery of the goods is to be made, is valid.[1] In the case of Shepard *v.* Heineken,[2] the facts were that the plaintiff shipped twenty firkins of butter. The voyage was abandoned (owing to the unseaworthiness of the defendant's vessel), before she sailed at all. The defendant refused to give up the butter to the plaintiff, who did not tender or offer to return the bills of lading, or to indemnify the defendant against them. The court held that the bills of lading required the property to be delivered to the consignees therein named, or to their assigns and, without a surrender of the bills or the consent of the consignees, the defendants were not bound to deliver. They had a right to require such surrender or consent, or (what they did require) an indemnity against the bills. The shipper may subject delivery to the consignee to any conditions he thinks proper. So, where flour was delivered to a carrier to be transported and delivered at destination to the consignees, upon presentation of a duplicate

[1] Bishop *v.* Empire Trans. Co., 33 N. Y. Supr. Ct. 99; Ferguson *v.* Donville, 3 P. & B. (New Brunswick Reps.) 576. See the legislation in Pennsylvania and New York on this subject.

[2] 2 Sweeny (N. Y.), 525.

bill of lading and the carrier delivered to said consignee without such presentation, he was held liable for the value of the goods.[1] In a recent Georgia case it was held that a railroad agent had a right, for his own security, to exact the production of the bill of lading before delivery, or to have it shown that its non-production would leave no liability on the part of the company to a *bona fide* assignee thereof.[2]

§ 398. A bill of lading is supposed to be made with reference to the usage, as to delivery, at the port of delivery, but if there be no usage, the delivery should be according to the general custom. Where the local usage differs from the general custom, it must be made very plain.[3] Where it was in question whether a delivery on a wharf boat at Memphis was by virtue of a general custom, a good delivery to consignee, it was said that a bill of lading is a special contract, in general not to be varied by parol evidence, but that where some of its terms by the usages of trade have acquired a peculiar signification, a legal presumption arises that the persons engaged in such trade used such terms according to that acceptation. Such custom is, however, not to be established without clear and satisfactory proof of its actual existence and of the general acquiescence therein by the public.[4] The proper mode of delivering goods transported by water is determined by the custom of the port of delivery and the course of trade between the parties. Where the bill of lading stipulates for delivery to the consignee, to justify a substituted delivery, the carrier must show that such delivery is according to the custom of the port of delivery.[5] A usage of consignees at a port to receive shipments, during a quarantine season, at the quarantine grounds as being a compliance with the engagement of the bill of lading to deliver at such

[1] McEwen *v.* J., M. & I. R. R. Co., 33 Ind. 369; Bishop *v.* Empire Trans. Co., 33 N. Y. Supr. Ct. 99; Jeffersonville, etc, Ry. Co. *v.* Irvin, 46 Ind. 180.

[2] Bass *v.* Glover, 63 Ga. 745. See also Dwyer *v.* Gulf, etc., Ry. Co., 69 Texas, 707.

[3] Cope *v.* Cordova, 1 Rawle (Pa.), 202.

[4] Wayne *v.* Steamboat Gen. Pike, 16 Ohio, 421; The Tybee, 1 Woods, 358; Turnbull *v.* Citizens Bank, 4 Woods, 192; Bradstreet *v.* Heron, Abbott's Adm. 209; Bank of Commerce *v.* Bissell, 72 N. Y. 615; Pindell *v.* St. Louis, etc., R. Co., 34 Mo. App. 675.

[5] Richmond *v.* Union Steamboat Co., 87 N. Y. 240.

port, is valid and the bill of lading should be construed with reference to it.[1]

§ 399. Custom, however, cannot vary the terms of an unambiguous contract. In Turnbull *v.* Citizens Bank,[2] a bill of lading for 117 tons of pig iron in the usual form contained the following clause: "The said master hereby acknowledging having received the full weight of iron herein specified, the same having been weighed alongside at shipment and holding himself and the said vessel bound to deliver the same weight of iron, provided it be weighed alongside at discharging." The iron could not be unloaded and piled on the wharf on account of wharf regulations prohibiting it, so that the ship was obliged to have it trucked across the wharf to terra-firma, where it was weighed and found to be some tons short. On a libel for a balance of freight and charges, Mr. Justice PARDEE said: "The consignees also urge a custom of the port as sworn to in these terms: (The term, taken from alongside, in its general acceptation with merchants here, does not mean that the merchant is to take it from within a foot or two of the ship, but that the ship is to deliver on the earthwork, as is customary at this port.) Conceding such a custom—custom cannot vary the terms of an unambiguous contract; to allow such a custom to come in where the parties have specified that the cargo 'is to be taken from alongside,' would be to render nugatory such a clause. That undoubtedly and plainly means that they were to take it from where the ordinary appliances of the ship would leave it in discharging, at the end of the ship's tackle."

§ 400. An actual discharge of the goods at the warehouse of the consignee is not required to constitute delivery. It is enough that the master discharge the goods upon the wharf, giving due and reasonable notice to the consignee of the fact.[3] A

[1] Bradstreet *v.* Heron, Abbott's Adm. 209.

[2] 4 Woods, 192.

[3] The Eddy, 5 Wallace, 481; Cope *v.* Cordova, 1 Rawle (Pa.), 211; Chickering *v.* Fowler, 21 Mass. (4 Pick.) 371; Gauche *v.* Storer, 14 La. Ann. Rep. 411; Morgan *v.* Dibble, 29 Texas, 107; Fay *v.* Alliance Ins. Co., 16 Gray, 455; Germania Ins. Co. *v.* La Crosse, etc., Co., 3 Bissell, 501; Gleadell *v.* Thomson, 56 New York, 194; Kennedy *v.* Dodge, 1 Benedict, 311; The Ship Ben Adams, 2 ib. 445; The Steamship Ville De Paris, 3 ib. 276; The Bark, Fangier, 3 Ware,

delivery on the wharf, however, is not sufficient if the consignee has no opportunity to inspect the goods. In Dibble *v.* Morgan,[1] the bill of lading provided that "the landing of the goods upon the wharf should be considered a delivery to the consignee." The vessel arrived at her destination and by noon had landed all her cargo upon the wharf, but the weather being bad and growing stormy, the goods of the various consignees were piled up in one bulk and covered with tarpaulins. The officer of the ship refused to let them be removed, saying that they were not ready to deliver. During the night following, the wharf was damaged by the storm and the goods were lost. The court held that, as no opportunity to inspect the goods was given to the consignee, there was no proper delivery and that the carrier was liable for the loss.

§ 401. In the case of The Eddy[2] it appeared that the master of a schooner received on his vessel at New Orleans some hogsheads of sugar and syrup to be delivered at Charleston, South Carolina. The bill of lading provided for the payment of the freight by the consignees. The vessel arrived safely and notice was given to the consignees that the goods would be delivered to them on the payment of the freight. The consignees declined to pay the freight, unless the sugars and syrups were all delivered in their store and after inspection were found to be in good order and uninjured. A portion of the goods was delivered, but on the refusal to pay the proportion of freight due on the goods so delivered, the balance was put in store by the master and subsequently sold for storage. Mr. Justice CLIFFORD, in delivering the opinion of the court, said: "Delivery on the

110; The Santee, 7 Blatchf. 186; The Boston, 1 Lowell, 464; Cain *v.* Garfield, ib. 483; The Phila. & Reading R. R. Co. *v.* Northam, 2 Benedict, 1; Close *v.* Beatty, 28 U. C. C. P. 470; McMaster *v.* Walker, 8 L.C. Rep. 171; Bradley *v.* Dunipace, 7 H. & N. 200; Scholes *v.* Ackerland, 15 Illinois, 474; The City of Austin, 2 Fed. Rep. 412; 1265 Vitrified Pipes, 14 Blatchf. 274; Wheeler *v.* St. L. & Southeastern Ry. Co., 3 Mo. Ap. 359; Medley *v.* Hughes, 11 La. Ann. Rep. 211; Scott *v.* Hescroff, 5 L. Can. Rep. 274; Tarbell *v.* Royal Exch., etc., Co., 110 N. Y. 170; Arthur *v.* St. Paul, etc., R. Co., 38 Minn. 95; Independence Mills Co. *v.* Cedar Rapids, etc., R. Co., 72 Iowa, 535; Feige *v.* Mich. Cent. R. Co., 62 Mich. 1.

[1] 1 Woods, 407.

[2] 5 Wallace, 481.

wharf in the case of goods transported by ships is sufficient under our law, if due notice be given to the consignees and the different consignments be properly separated so as to be open to inspection and conveniently accessible to their respective owners. Where the contract is to carry by water from port to port, an actual delivery of the goods into the possession of the owner or consignee or at his warehouse is not required in order to discharge the carrier from his liability. He may deliver them on the wharf; but to constitute a valid delivery there the master should give due and reasonable notice to the consignee, so as to afford him a fair opportunity to remove the goods or put them under proper care and custody. When the goods, after being so discharged and the different consignments properly separated, are not accepted by the consignee or owner of the cargo, the carrier should not leave them exposed on the wharf, but should store them in a place of safety, notifying the consignee or owner that they are so stored, subject to the lien of the ship for the freight and charges, and when he has done so he is no longer liable on his contract of affreightment."

§ 402. A delivery on the wharf is not sufficient if the goods are discharged in such an unskilful and negligent manner that the dock on which they are placed breaks down and they are precipitated into the water and lost.[1] Nor will the carrier be relieved by a loss occasioned by the misconduct of his own servants after the goods have been placed upon the wharf. In Gleadell *v.* Thomson[2] the bill of lading exempted the carrier from liability for "any act, negligence, or default whatsoever, of the pilot, master, or mariners." It also provided that the goods should be taken from alongside by the consignees "immediately the vessel is ready to discharge, or otherwise the privilege is reserved to the vessel to land them on the pier, at the expense of the consignee and at his risk of fire, loss, or injury." The goods were placed on the plaintiff's pier and the defendant's agents were placing tarpaulins upon them to protect them from a storm when one of the tarpaulins was forcibly taken away from them by the plaintiff's servants and used to cover

[1] Kennedy *v.* Dodge, 1 Benedict, 311.

[2] 56 N. Y. 194.

the hatchway of the ship. The court held that "any act, negligence, or default whatsoever of the pilot, master, or mariners" related only to the time while the goods were upon the ship in the course of the voyage, but that the clause did not relieve the plaintiff from liability for a loss resulting from the misconduct of his servants after the goods were on the wharf. If a bill of lading provides that the goods "shall be at the risk of the owner, shipper, or consignee thereof as soon as delivered from the tackles of the steamer at her port of destination," the carrier is not bound to watch the property after it has passed beyond the ship's tackles to see that it is kept safe.[1]

§ 403. A delivery at the wharf of a third party is not a delivery according to a bill of lading which designates another place of delivery.[2] If no wharf is designated and there are two or more wharves in the port equally convenient to the carrier, he is bound to deliver at the one most convenient to the consignee or his assigns. In the case of "The Boston,"[3] the libellants shipped a cargo of coal on board the schooner "Boston," and received a bill of lading requiring delivery to "B. & H., or their assigns," and further providing that in twenty-four hours after arrival at the port and notice thereof to the consignee, the vessel should be discharged at a certain rate. The consignees refused to receive the coal and indorsed the bill of lading to the shippers, who thereupon ordered the master to discharge at a certain other wharf, but the master having come up to the wharf next to that of the original consignees, refused to go elsewhere.

The court said: "There is no evidence of what is usual or suitable in respect to cargoes of coal; but, considering the heavy nature of the cargo, which makes its transportation on land very costly, I am led to doubt whether a usage to land such a cargo at a distance from the owner's wharf could be considered reasonable. In the absence of evidence of usage, I lay down the rule of law, as I did in another case, that when there are two or more wharves in the port equally convenient to the carrier, he is bound to deliver at that most convenient to

[1] The Santee, 7 Blatchf. 186. See also Fay *v.* Alliance Ins. Co., 16 Gray, 455.

[2] Humphreys *v.* Reed, 6 Wharton (Pa.), 434.

[3] 1 Lowell, 464.

the shipper; at least if he be duly and reasonably notified of such preference. And where one shipper or consignee owns the whole cargo, he has, in my opinion, the same right that a charterer would have to say where the vessel shall discharge, it being, of course, a suitable place and within the limits of the port."

§ 404. When a delivery cannot be made at destination, such prudent care of the goods and their diligent and safe delivery, with notice to the consignee at such point as best comports with the interests of the owner, according to the circumstances, will excuse the carrier, but the carrier must prove such matter of excuse.[1]

Where goods were, by the bill of lading, to be landed at "Chelsea, below bridges," it was held they must be landed there from the ship if it could be done with safety to her.[2]

In a suit for a statutory penalty in Alabama for the landing of goods by a carrier less than ten feet above the water of a river where they were submerged and greatly injured, where it appeared that the warehouseman to whom they were consigned told the carriers they might put them there and said he was satisfied, it was held that the consignee is the agent of the owner to receive goods at the port of delivery and has authority to receive them at any particular point of that port. Where the bill of lading stipulates for delivery to "warehouse or assigns," the warehouseman at the landing is the consignee.[3]

§ 405. Where, after inquiry, the consignees under a bill of lading cannot be found, the duty of the carrier is to retain the goods until they are claimed, or to store them prudently for the owner. Close *v.* Beatty[4] was an action brought for not delivering goods shipped on board the defendant's vessel, to be delivered to the plaintiffs or their assigns. The defendants pleaded that they carried the goods to their destination and, there being no person on plaintiff's behalf to receive them, or to whom notice of their arrival could be given and no means of notifying the plaintiffs, who lived at a great distance, the defendants having no warehouse of their own and there not being any other ware-

[1] Green and Barren River Nav. Co. *v.* Marshall, 48 Ind. 596.

[2] Shaw *v.* Gardner, 12 Gray, 488.

[3] Winston *v.* Cox, 38 Ala. 268.

[4] 28 U. C. C. P. 470.

house in which they could store the goods, after waiting a reasonable time, landed the goods at the only wharf there, where it was usual and customary to land goods, and placed them in the care of the person in charge of the wharf, so far as he would consent to take charge of them. The plaintiffs demurred and it was held that the plea was no defence, the court saying: "We cannot agree that this was a fulfilment of their duty."

§ 406. What constitutes a delivery on a wharf was considered in the case of The Steamship Ville de Paris.[1] A package of goods, being one of three specified in a bill of lading, was delivered over the ship's side by its employés, placed from its tackles upon a hand-truck belonging to the ship and was then wheeled by an employé of the ship to the door of a movable house which stood at a point between the ship's gangway and the inner end of the wharf. The employé stopped with the truck having the case upon it, in front of the customs inspectors, who were at the door of the house and submitted the case to their view. One of them placed upon it the letters "P. S.," with chalk and it was then wheeled away on the same truck, by the same employé of the ship, further towards the inner end of the wharf and further from the ship than the house. So far as it appears it was never seen or heard of afterwards. Its deposit upon the wharf from the truck was not shown. The letters "P. S." indicated that it was to be taken to a public store and it was in course for the truckman to deposit it at a particular place on the wharf which the inspectors had previously designated as a place for the aggregation of such packages as were to be taken to a public store. It was not found at that place. Search was made for it about half an hour afterwards, but it could not be found. The other two cases, which came out of the ship at other times, were wheeled separately on other trucks to the inspector's house and were there marked by them each with a cross, to denote that they were to be delivered to their consignees, were afterwards found at their proper place of deposit on the wharf (which was a different place from that where the case in question ought to have been deposited), and were received by the libellants. The wharf was

[1] 3 Benedict, 276.

exclusively occupied by the claimants and was inclosed on the inner end of it by a fence, access through which was had by gates. The court held that these facts did not constitute any delivery of the case on the wharf, or any delivery of it to the custom house authorities, so as to exonerate the vessel from her liability under the bill of lading.

§ 407. McMaster *v.* Walker[1] was a rather curious case, involving the general subject of delivery by a carrier to a consignee. The plaintiffs sued for the value of two chains, which, together with a third chain, the defendant, as master of a steamship, had received in good order and condition as per bill of lading, and had undertaken to carry and deliver, but which he neglected and failed to do. While the said three chains were still in his charge and custody, two of them were, by the carelessness and negligence of defendant, lost overboard and sunk. The defendant pleaded full delivery. The evidence established that shortly after the arrival of the steamship a bateau was sent alongside of her, at the instance of the plaintiff, to receive the three chains in question; that for the purpose of delivery the people on board of the steamship attached the three chains together by tying the ends with rope; that by this means the chains were hoisted out of the hold, a number of feet at a time, and slackened off into the bateau alongside, and in this manner delivery was proceeded with until two of the chains and part of the third had been delivered and put on board of the bateau, when a portion of this chain got down between the steamship and the bateau, and by its weight began dragging away the other portions on board of both the steamship and the bateau, and all upon the bateau was carried out and sunk in the river, the rope gave way and the two chains remained at the bottom of the river. The owner of the bateau said that the loss was occasioned by the too great rapidity with which the people of the steamship delivered it; that they could not receive it so fast. It was held, "In this case the court here confirms the judgment of the court below. The chains being attached together by the people on board the steamship were one whole and until a delivery of the whole was made, there

[1] 8 Lower Can. Rep. 71.

was no delivery at all and therefore they, the people of the steamship, ought to have observed greater caution. It is moreover proved, that the ropes with which they were attached were not strong enough and therefore the people on board of the steamship ought to have taken more care and greater precaution in slackening the chain into the bateau."

§ 408. Where packages, identical in appearance, but containing goods of different quality or weight, are so mingled in the vessel that a wrong delivery is made to the respective consignees, the carrier is liable for any loss resulting from the mistake. In the case of the ship "Ben Adam,"[1] flour was shipped on board of a vessel by two different shippers, the flour being all similarly branded, but the two different lots having also other brands by which they were easily distinguishable. In the bills of lading given to the respective shippers the flour was entered the same. On the arrival of the vessel only a part of one consignment was delivered to the consignee, it being of a better quality than that in the other consignment, and the remainder was taken away by the consignee of the other lot, who was allowed to take it from the other dock by the delivery clerk of the vessel having charge of the delivery of the cargo. The court held that the consignee was entitled to a delivery of the identical barrels shipped and was entitled to a decree against the ship for the damages occasioned by the non-delivery to him of the whole number of barrels shipped to him, less the freight and primage.

§ 409. Bradley *v.* Dunipace[2] was a case in which a flour company shipped on a vessel of which the defendant was master, 1676 bags of rye meal, some of which weighed 12 and some 8 stone each. They were shipped all mixed together and the master knew nothing of their relative capacity. He signed two bills of lading, one for 1209 bags and one for 467 bags deliverable to order. The latter was for 467 bags rye meal, gross 35 tons 9 cwt. and at the foot of it was "contents unknown and not responsible for weight." The bags were all marked alike and no means were taken to identify by marks in the bills of lading any particular bags. There was nothing on the face of the

[1] 2 Benedict, 445.

[2] 7 H. & N. 200; 32 L. J. Exch. 22.

bills of lading from which the master could see that they were intended for different consignees. The defendant by mistake delivered to the plaintiff, the consignee of the 467 bags, a number of bags of only 8 stone. The right number was delivered, but the total weight was short several tons. It was held in the Exchequer Chamber, on appeal from the Exchequer, that the master was responsible for the deficient delivery. Where, by mistake through the error of the clerk of a carrier, two consignments were put together in one bill and both lots of stock were delivered to one shipper, whereby the other shipper lost his property, the carrier company was held liable for the value of the stock and interest.[1] The owner of a vessel is liable for the expense of the carriage of goods from the place where the master lands them to the place of landing called for by the bill of lading of the goods.[2]

§ 410. Where, by the contract with a railroad, goods are to be unloaded by the consignee and this has been done, no further act remaining to be done by the carrier, nothing is wanting to constitute a delivery.[3] A stipulation in a shipping bill that delivery of goods will be considered complete and the responsibilities of the carrier will be considered to terminate when placed in the carrier's shed or warehouse, relieves the carrier only from liability as such and not as warehousemen, where the goods have been stored and no notice of arrival given, although it was the custom of defendants to deliver goods and charge for cartage.[4] Where an express company's receipt for goods said "to be forwarded to our agency nearest or most convenient to destination only," it was held that the word "agency" included not only the defendants' place of business, but also their servants and teams employed to deliver packages and that they were liable for the carriage and delivery of packages so far as their agency extended.[5]

[1] C. & N. W. R. R. Co. *v.* Ames, 40 Ill. 249.

[2] The Port Adelaide, 38 Fed. Rep. 753; Beard *v.* Steele, 34 Upper Canada Q. B. 43; Richmond *v.* Union Steamboat Co., 87 N. Y. 240.

[3] Reineman *v.* C. C. & B. R. R. Co., 51 Iowa, 338; Dennis *v.* C. & C. B. R. R. Co. ib.

[4] McCrosson *v.* Gr. Tr. Ry. Co., 23 U. C. C. P. 107.

[5] Sullivan *v.* Thompson, 99 Mass. 259.

§ 411. Delivery to the consignee and acceptance by him of goods at any other place than the one specified, will discharge a carrier from his contract to deliver at that place,[1] but where a disaster happens to a cargo in consequence of a peril or accident not within the exceptions of the bill of lading, a mere acceptance of the goods by the owner at an intermediate port or at the place of disaster, will not preclude him from his remedy. It must appear that the acceptance was intended as a discharge of the vessel and her owners from any further responsibility.[2] Where a voyage is stopped by an embargo, an authorized receipt of the cargo at the point of departure by an agent of the owners and the sale of it will, of themselves, defeat an action on the bill of lading against the carrier.[3]

§ 412. Where a bill of lading is silent as to the time for unloading, a reasonable time is allowed.[4] The consignee is entitled to a reasonable opportunity to examine his goods to see if the obligations of the bill of lading have been fulfilled by the carrier. Until this is given, the carrier is not entitled to demand his freight. For instance, where a consignment consists of cheese, the master should place it in the levee separate from the rest of the cargo, so as to give the consignees an opportunity to inspect it.[5] Where the bill of lading gives three days to unload the cargo and provides for a certain rate of demurrage thereafter, the consignee has a right to detain the vessel a reasonable time after the three days and the right can be terminated only by notice given by the carrier, that if the goods should not be received within the reasonable time therein specified, they would be stored elsewhere.[6] Property is to be considered as "awaiting delivery" as soon as it is in

[1] 1 Penna. Co. *v.* Holderman, 69 Ind. 18; Wright *v.* Cluxton, 31 U. C. Q. B 246; Arbuckle *v.* Thempen, 1 Wright (Pa.), 170; Bulkley *v.* Naumkeag Steam Cotton Co., 24 Howard, 386.

[2] Home Ins. Co. *v.* W. T. Co., 51 N. Y. 93.

[3] Brown *v.* Delano, 12 Mass. 370.

[4] Henley *v.* The Brooklyn Ice Company, 14 Blatchf. 522; Nudd *v.* Wells, 11 Wisc. 407; Brittan *v.* Barnaby, 21 Howard, 527; L. L. G. R. R. Co. *v.* Maris, 16 Kans. 333; Kemp *v.* McDougall, 23 U. C. Q. B. 380; Howard *v.* Shepherd, 9 C. B. 296; Dibble *v.* Morgan, 1 Woods, 407.

[5] Lanata *v.* Ship Henry Grinnell, 13 La. Ann. Rep. 24.

[6] Western Trans. Co. *v.* Barber, 56 N. Y. 544.

condition to be delivered to the consignee when demanded and not merely from the time when the right to charge for storage accrues.[1]

§ 413. A consignee by accepting a cargo with knowledge of the terms on which it was transported, makes himself by adoption a party to the contract between the shipowner and the consignor[2] but the consignee and his assigns, not being parties to the contract in the bill of lading, are not bound to accept the cargo at any particular time and incur no responsibility by a refusal or delay in accepting it.[3]

§ 414. The stipulation as to the "loss" of goods does not apply to their delivery to a wrong person.[4] Where a carrier makes an erroneous entry on a bill of lading whereby the goods are delivered to the wrong person, he is liable for the loss.[5] In Libby *v.* Ingalls,[6] the carriers, who had been instructed to deliver to the order of the shippers, delivered the goods to the consignees without their producing any bill of lading, receipt or order of the shippers. The court held that until the carriers could deliver to the shippers or some one showing authority from them, it was their duty to retain and take care of the goods and if they delivered to one not entitled to them, they became liable to the owners for their value. In Southern Express Co. *v.* Dickson,[7] an express company well knowing that

[1] M. C. R. R. Co. *v.* Hale, 6 Mich. 243; Putnam *v.* Furnam, 71 N. Y. 590.

[2] Morse *v.* Pesant, 2 Keyes (N. Y.), 16; Putnam *v.* Furnam, 71 N. Y. 590; Rodgers *v.* Phillips, 40 ib. 519.

[3] Gage *v.* Morse, 94 Mass. 410.

[4] B. & O. R. R. Co. *v.* McWhinney, 36 Ind. 436; Brunswick *v.* U. S. Express Co., 46 Iowa, 677; Collins *v.* Burns, 4 J. & Sp. 518; Bush *v.* St. L. K. C. & N. Ry. Co., 3 Mo. App. 62; Hieskell *v.* Farmers & Mechanics' Nat. Bank, 8 Norris, 155; Boatman's Saving Bank *v.* West & C. R. R. Co., 81 Ga. 221.

[5] Forsythe *v.* Walker, 9 Barr, 148.

[6] 124 Mass. 503. See also Bank *v.* Bissell, 72 N. Y. 615; Weyand *v.* Atchison, etc., R. R. Co., 75 Iowa, 573; The Stettin, L. R. 14 P. D. 142; Neekey *v.* St. Louis, etc., R. R. Co., 35 Mo. App. 79; Nebenzahl *v.* Fargo, 22 N. Y. St. Repr. 231; Gibbons *v.* Farwell, 63 Mich. 344; No. Pa. R. R. Co. *v.* Bank, 123 U. S. 727; Wells *v.* Oregon, etc., Ry. Co., 32 Fed. Rep. 51; Furman *v.* Union Pacific Ry. Co., 106 N. Y. 579; Wernwag *v.* P. W. & B. R. R. Co., 117 Pa. St. 46; Chester Bank *v.* A. & C. Ry. Co., 25 S. C. 216; Merchant's Desp. *v.* Merriam, 111 Ind. 5; Wilson *v.* Adams Exp. Co., 27 Mo. App. 360.

[7] 4 Otto, 549.

certain goods received for transportation to a place mentioned in the bill of lading were the property of the shipper, delivered them to a third person on the consignee's order at the place of shipment. The carrier was held liable to the shipper for the value of the goods.

Where goods are sent to two consignees jointly, delivery to either is delivery to both[1] and if goods are directed to A. care of B., delivery to B. is sufficient.[2]

Where a bill of lading is issued for delivery to the shipper's order, the carrier is bound to deliver to no one who has not the order. If the indorsee is unknown, diligent search must be made for him.[3] A bill of lading is not evidence of delivery to the consignee. That ought to be shown by legal evidence independently of the bill of lading.[4]

§ 415. The consignor's marks on goods are no excuse for an unauthorized entry on the bill of lading made by the carrier, whereby a wrong delivery is made or loss occasioned,[5] and marks on goods copied into the bill of lading cannot be used to contradict the language used in the body of the bill. Thus in Wheeler *v.* St. L. and Southeastern Ry. Co.,[6] the defendant contracted to carry the goods of the plaintiff "to Nashville, Tenn., there to be delivered to J. E. Butler or order, etc." Under the head of marks following the above in one of the bills of lading were the words "J. E. Butler, Atlanta, Ga." In two others the words "Atlanta, Ga." immediately followed the name of consignee where it first occurred. The court held that the defendant was bound to carry only to Nashville. The "marks" on packages might serve for an address, but the copies of them in the bills of lading could serve no purpose but to identify the parcels. They could not contradict the language used in the body of the contract, which was plainly that the goods should be delivered at the company's freight station at Nashville.

[1] Wells *v.* Am. Express Co., 44 Wisc. 342.

[2] Ela *v.* A. M. U. Express Co., 29 ib. 611.

[3] The Thames, 14 Wall. 98; Mayer *v.* Gr. Tr. Ry. Co., 31 U. C. C. P. 248.

[4] Flower *v.* Downs, 12 Robinson (La.), 101.

[5] Forsythe *v.* Walker, 9 Barr, 148.

[6] 3 Mo. App. 359.

CHAPTER XXX.

A BILL OF LADING IS A MUNIMENT OF TITLE—A SYMBOL OF THE GOODS—A MEANS OF TRANSFERRING TITLE.

Bill of lading is a muniment of title, § 416.
Bill is a symbol or representative of the goods, § 417.
Bill is evidence of an insurable interest in the cargo in prize courts in England, § 418.
And in American prize courts, § 419.
Delivery of the bill is a sufficient delivery of the goods within the statute of frauds, § 420.
Bill of lading is a means of transferring title, § 421.
Right of a vendee to demand a bill of lading, § 422.
Vendee is not entitled to all existing copies of the bill of lading, § 423.
Duration of the bill of lading's availability as a symbol, §§ 424, 425.
Duration where there is a continuous carriage on several connecting lines, § 426.
Holder of the bill of lading is not bound to give notice of his title, § 427.

§ 416. It has been seen that the bill of lading operates as a receipt for the goods therein specified and as a contract for their carriage. There remains for consideration a third office of the instrument, which gives rise to a third set of questions of the highest importance and of no little difficulty. In this division of the work will be examined the bill of lading as evidence of ownership of the goods and as a means of transferring the title to them.

§ 417. Stated in its broadest terms, the principle governing the bill of lading as a muniment of title is, that the bill represents the goods themselves symbolically and the effects of its possession or transfer are to be controlled by considerations peculiar to symbols alone and not, on the one hand, solely by the principles regulating the possession and transfer of actual goods and chattels, nor, on the other hand, solely by those regulating the possession and transfer of instruments representing pure value measured by a monetary standard. The purposes for which a symbol of property may be made in any way available are obviously two. If it possess any validity

in law whatever, it will enable the holder to obtain actual possession or delivery of the goods represented, or equivalent damages, or it will enable him to confer the right to obtain that possession or delivery upon another, by transferring to the latter the symbol which entitles him to it. These offices belong to the bill of lading. While the goods themselves are out of the possession of the owner, in transit, either by land or by water, to their destination, the bill represents them and by its means the owner is enabled to do with them symbolically whatever he might do actually, were they under his immediate control. Representing the goods, the bill is *prima facie* evidence of the consignee's title. Possession of the bill raises the same presumption for this purpose as possession of the goods themselves.

§ 418. The consignee's production of a bill of lading constitutes ordinarily *prima facie* evidence of an insurable interest in the goods.[1] In England, however, the contrary rule seems to be established by the case of The John Bellamy,[2] in which the parties were the insurers of a cargo which had been lost in a collision and the owners of the vessel which had been found at fault and condemned in damages,—the insurers having paid for a total loss upon the cargo previously to the institution of the suit. The plaintiffs produced the policies of insurance, which had been given up to them, the invoice, a copy of the manifest and the bills of lading. The plaintiffs' right to recover was held not to be sufficiently established by the evidence, since it had not been proved that the shippers were, or represented, the owners of the cargo, who were the real parties to be indemnified by the party condemned,—the latter having a right to be secured against liability to a future demand by the possible possessors of a better title than that furnished by the shippers to the underwriters. "With respect to the fact of insuring," said the Court, "the insured may have insured as agent or have had an insurable interest of his own in the goods distinguishable from property in them. The shipper is the agent of the owner to put the goods on board, but I am not satisfied that the insur-

[1] Talcott *v.* Delaware Ins. Co., 2 Wash. C. C. 449; Blagg *v.* Phœnix Ins. Co., 3 Id. 5.

[2] L. R. 3 Adm. 129.

ance of the goods is within the scope of his agency and no special circumstance is suggested in the case before me." As to the bill of lading, which in this case had been drawn in quadruplicate, the Court said: "This instrument is not *per se* incontrovertible evidence that the property specified has passed to the holder; . . . . it does not prove that the shipper is the owner. It may be that one of these bills of lading has been delivered at an earlier date to some person other than the underwriter, which other person would, on the ground of his earlier possession of the bill of lading, have a prior title to the goods," citing Barber *v.* Meyerstein[1] and Conturier *v.* Hastie.[2] It was accordingly held that the defendants were entitled to require evidence of a discharge from the original owners.

§ 419. In American prize courts a bill of lading consigning goods to a neutral, though unaccompanied by an invoice or letter of advice, is, while not in itself sufficient evidence to enable a claimant thereunder to obtain restitution, a sufficient foundation to permit the introduction of further proof,[3] but both in cases involving the rights of neutrals on the high seas[4] and in those involving the insurance of property lost or captured[5] the bill of lading is not the only evidence nor always the best evidence of ownership. Its authenticity or truth may be attacked by either party. It is with great reason that in prize cases a comparatively slight importance should be attached to the bill of lading as an evidence of ownership, since it is so frequently the case that during war, goods shipped by sea are given a false apparent ownership for the very purpose of saving them from confiscation in case of capture.[6] The bill of lading for an outward-bound cargo is of course no evidence of any title in the return cargo.[7]

[1] L. R. 4 H. L. 317.

[2] 5 H. L. C. 673.

[3] The Friendschaft, 3 Wheat. 14.

[4] United States *v.* Jones, 3 Wash. C. C. 209; The St. Jose Indiano, 1 Wheat. 208.

[5] Maryland Ins. Co. *v.* Ruden, 6 Cranch, 338; Blagg *v.* Phœnix Ins. Co., 3 Wash. C. C. 5.

[6] It was said, however, in The St. Jose Indiano, 1 Wheat. 208, that "in general the rules of the prize court as to the vesting of property are the same with those of the common law;" p. 212.

[7] Beale *v.* Pettit, 1 Wash. C. C. 241.

§ 420. The character and effect of a bill of lading, as that of a representative equivalent of specific goods, is well exemplified in the cases relating to sales of goods as affected by the Statute of Frauds. The delivery of the bill of lading to the consignee is held to be a delivery sufficient to satisfy the statute.[1] In general, where goods are bought to be sent to the buyer, delivery to a carrier, either general or specially designated by the buyer, is a sufficient delivery and vests title to them in the latter, although it must be borne in mind that acceptance as well as delivery is necessary. Even a delivery to a carrier designated by the purchaser will not satisfy the statute where the carrier has no authority other than to transport the goods. Where, however, the bill of lading is delivered to the consignee or his representative and accepted, the statute is satisfied. It follows, conversely, that the delivery of a bill of lading to an agent who has no authority to act and its acceptance by him, can of themselves have no force to take the case out of the statute.[2] This rule is laid down in an English case, even where the vendee knew of the receipt of the bill by an unauthorized agent, but did and said nothing to disaffirm the acceptance.[3] So, if the buyer obtains a bill of lading from the seller, without any intention on the part of the seller to deliver it and insists on retaining possession of it against the remonstrance of the seller, he cannot avail himself of it to bar the operation of the statute.[4]

§ 421. The office of the bill of lading, not only as a means of safely retaining and securing the owner's title while the ownership and the immediate possession of the property are secured, but as an instrument for legally transferring either the ownership or the right to possession upon the termination of the transit, or both, is thoroughly established. It is an undoubted general principle that as effective a transfer of title and of the right to delivery may be made by the owner's transfer of the bill of lading as could be made by a physical delivery of the goods themselves. "A cargo at sea, while in the hands of the

[1] Audenried *v.* Randall, 3 Clifford, 99; Rodgers *v.* Phillips, 40 N. Y. 527.

[2] Quintard *v.* Bacon, 99 Mass. 185.

[3] Meredith *v.* Meigh, 2 El. & Bl. 363.

[4] Brand *v.* Focht, 1 Abb. App. 185.

carrier, is necessarily incapable of physical delivery. During this period of transit the bill of lading by the law merchant is universally recognized as its symbol and the indorsement and delivery of the bill of lading operates as a symbolical delivery of the cargo. Property in the goods passes by such indorsement and delivery of the bill of lading, whenever it is the intention of the parties that the property should pass, just as under similar circumstances the property would pass by an actual delivery of the goods. . . . . It is a key which in the hands of the rightful owner is intended to unlock the door of the warehouse, floating or fixed, in which the goods may chance to be."[1]

§ 422. When a bill of lading may be rightfully demanded in accordance with the terms of a contract of sale, the vendee of goods is entitled to it, as soon as it is transmitted to the consignors, or their agents, at the terminus of the transit, without reference to the arrival or unloading of the cargo. Where it is the evident intent of the contract that the bill of lading shall be sent as soon as it can be, a refusal of the vendor to deliver it within a reasonable time after its arrival, whether the goods themselves have arrived or not, justifies the vendee in rejecting the purchase.[2] The case is of course stronger where there is a specific agreement between a commission merchant who makes advances for the consignor's purchase of the goods shipped and such consignor that the latter shall forward to the former a bill of lading to secure such advance. A transaction of this kind is in fact an equitable pledge of which a court of equity would decree specific performance.[3]

§ 423. The consignee is not entitled to demand all existing copies of the bill of lading. If only one copy of the bill has been indorsed, the delivery of that copy with the intention to pass the property is all that the vendee is entitled to demand, although the bill has been drawn in triplicate and the remaining copies are not tendered. It seems that he cannot insist that the remaining bills shall be delivered in time for him to forward them so that they may be at the port of delivery either before the arrival of the goods or before charges are incurred

[1] Bowan, L. J., Sanders *v.* Maclean, 11 Q. B. Div. 327.

[2] Barber *v.* Taylor, 5 M. & W. 527.

[3] Lutscher *v.* Comtoir d'Escompte de Paris, L. R. 12 B. D. 709.

in respect to them. He can only demand that the vendor shall make every reasonable exertion so to do.[1]

§ 424. As a general rule the bill of lading continues to represent the goods only so long as they are in transit. The general principle of the law in dealing with title to personal property, other than that evinced by possession, is that the owner must do all that is within his power to approximate as closely as possible to actual or constructive possession. His title must be evinced by all the *indicia* possible. Upon this ground it has been held that dock warrants and warehouse receipts are not muniments of title of as high and conclusive an order as bills of lading,—the delivery of the former not being equivalent to a delivery of the goods themselves as is generally the case with the latter.[2] The two classes of instruments differ from each other in this respect: that when goods are at sea, the purchaser who takes the bill of lading has done all that is possible in order to take possession of the goods,—there being a physical obstacle to his seeking out the master of the ship and requiring him to attorn to his rights, but when the goods are on land there is no reason why a person who receives a delivery order or dock warrant should not at once lodge it with the bailee and so take actual or constructive possession of the goods.[3] Ordinarily the bill of lading becomes *functus officio* as soon as the goods are landed and warehoused in the name of the holder, who thereupon no longer derives his power to control them from his possession of the bill.[4]

§ 425. In Meyerstein *v.* Barber,[5] however, it was held that the vitality of the bill of lading as a muniment of title was not necessarily exhausted as soon as the goods were landed at their destination, but it continued to be a transferable symbol of the property when the goods, though actually landed at a wharf, were subject to a stop order for freight. The bill in that case had been drawn up in a set of three. The first two were indorsed to the plaintiff upon an advance by the latter and the third, thus fraudulently retained by the consignee, was

[1] Sanders *v.* MacLean, L. R. 11 Q. B. Div. 327.

[2] Farina *v.* Horne, 16 M. & W. 119.

[3] Blackburn on Sales, 297.

[4] Hatfield *v.* Phillips, 9 M. & W. 649.

[5] L. R. 4 H. L. 317.

subsequently pledged to the defendant for an advance by him. The consignee then obtained a removal of the stop which had been put upon the goods by the ship-owners for freight and the defendant obtained possession under the bill held by him. The case turned upon the question whether the bills of lading had fully performed their office at the time when the plaintiff received them. It was contended on the defendant's behalf that such was the case. The court held, however, that a bill of lading remains in force, not only until the goods are landed, but until the freight is paid and the whole matter which is the subject of the contract of the ship-owner has been achieved. "When the goods have arrived at the dock, until they are delivered to some person who has the right to hold them, the bill of lading still remains the only symbol that can be dealt with by way of assignment or mortgage or otherwise. As soon as delivery is made, or a warrant for delivery has been issued, or an order for delivery accepted (which in law would be equivalent to delivery), then those symbols replace the symbol which before existed. Until that time bills of lading are effective representations of the ownership of the goods and their force does not become extinguished until possession, or what is equivalent in law to possession, has been taken on the part of the person having a right to demand it."

§ 426. When merchandise is transported to its destination over several lines of railroad or water carriage, the bill of lading issued at the starting-point is not necessarily *functus officio* upon the arrival of the goods at the termination of the first stage of the transit, but may, by custom or contract, remain in force until the final destination is reached. Thus, in Forbes *v.* Boston and Lowell Railroad Company,[1] it was proved to be the usual course of business in transporting grain from Chicago to Boston to ship it by water to an intermediate point and thence to Boston by rail. A bill of lading was issued at Chicago, making the grain deliverable to the shipper at the intermediate point. There a railroad receipt was given containing a memorandum, which indicated that the grain was

[1] 133 Mass. 154.

received from a vessel arriving from Chicago and that a bill of lading had been issued by the vessel and was still outstanding. The vessel's bill was regarded as transferring the property and it alone was used in obtaining the goods from the carrier. It was held that the vessel's bill did not become *functus officio* upon the arrival of the grain at the intermediate point, but continued to represent the cargo until its arrival in Boston.

§ 427. One who holds a valid title to or interest in merchandise, as the holder of a bill of lading received by him in good faith and for value from one having a title so transferable, is not bound to give notice of his title to the carrier or to take any further measures to protect his interest, though he must not be guilty of laches or of such acts as will estop him from setting up his title.[1] Upon his failure to obtain actual or constructive possession of the goods, his remedy may be in some cases against the carrier and in others against parties who have obtained the goods from the carrier; but his right to take the goods or to obtain equivalent damages remains unimpaired. It is the carrier's duty to deliver the goods to the party mentioned in the bill as the one who is to receive them. When there has been an indorsement or assignment it is the duty of the carrier to deliver the goods to the indorsee or assignee. When there are several copies of the bill the goods may properly be delivered to the first party presenting one of them if there be no notice of other indorsements of the other copies, although another has a paramount title by virtue of a prior indorsement.[2] In such a case the prior indorsee is remitted to his remedy against the party who obtained the goods.[3] He may justify a non-delivery to the holder of the bill of lading by interposing the *jus tertii*, but, except in the case of duplicate or triplicate bills, he cannot excuse himself for a delivery to the wrong person on the ground that the holder of the bill of lading was unknown to him and gave him no notice of his title. If after diligent inquiry the holder of the bill cannot be found, it is the

[1] See Forbes *v.* Boston & Lowell R. Co., 133 Mass. 154.

[2] Glynn *v.* East and West India Dock Co., L. R. 7 App. 605.

[3] Meyerstein *v.* Barber, L. R. 4 H. L. 317.

carrier's duty to retain the goods upon storage until a rightful claim to them is established. If by failure so to do the indorsee is deprived of his title, whatever damage has been suffered by the conversion, may be recovered from the carrier.[1]

[1] The Thames, 14 Wall. 98; Forbes *v.* Boston and Lowell R. Co., 133 Mass. 154; Farmers' Bank *v.* Logan, 74 N. Y. 568; Meyerstein *v.* Barber, L. R. 4 H. L. 317; Glynn *v.* East and West India Dock Co., L. R. 7 App. 605.

CHAPTER XXXI.

BILLS OF LADING ISSUED BY CARRIERS WITHOUT RECEIVING THE GOODS.

Carrier is not liable on such an unauthorized issuance by his agent. Grant *v.* Norway, §§ 428, 429.
Effect of the English Bills of Lading Act, § 430.
Issuance of second bill for goods received, § 431.
American cases—The Schooner Freeman *v.* Buckingham, § 432.
The rule applies to bills issued by shipping agents, § 433.
The contrary rule prevails in some jurisdictions—New York, Kansas, Nebraska, § 434.
Statutes providing that bills of lading shall be conclusive evidence of the receipt of the goods, § 435.
The bill gives title to goods received subsequently to its issuance, § 436.
The rule is not affected by statutes prohibiting the issuance of the bill without the receipt of the goods, § 437.

§ 428. It is a necessary incident to the purely symbolic character of the bill of lading that it cannot have the office and effect of a representative of goods where in fact none have been delivered to the carrier. It has no value which is fixed in measure by anything but the goods which it specifies and declares to be in the possession of the particular carrier and therefore when it fails to be a symbol of those goods it fails to be a symbol of anything. Stated in this form the proposition would seem to be self-evident, but there grows out of it a further question. Admitting that such a bill cannot possibly be considered a representative of the goods which it purports to represent, how are the relations which may be created by its issuance to be adjusted? Does the issuing of such a bill by an agent of the carrier impose upon the latter the liability he would incur as an actual recipient of the goods? The answer to this question involves considerations based upon the principles of agency, of estoppel and of negotiability. The question has been the subject of many well-considered decisions and it may now be regarded as a thoroughly settled principle in a majority of important commercial jurisdictions (though

the contrary rule obtains in others[1]), that an agent cannot bind the carrier by issuing a bill of lading for goods which are not delivered to him for transportation.[2] The adoption of this rule has been founded upon the cardinal principle that a servant cannot create any liability upon the part of his master by the commission of acts beyond the scope of his ordinary employment. This principle appeared in a *dictum* by Mr. Justice LITTLEDALE, in the case of Berkley *v.* Watling,[3] decided by the King's Bench in 1837, although the same court had decided a few years before, on what would appear to be the directly contrary principle, that the ship-owner who has given a bill of lading by which freight appears to have been paid before the ship's departure from port is estopped, as against an assignee of such bill, from alleging that the freight was not so paid.[4]

§ 429. The leading English case is that of Grant *v.* Norway.[5] In that case the subject was treated chiefly as a question of agency. "The point presented," said the court, "is whether the master of a ship, signing a bill of lading for goods which have never been shipped, is to be considered as agent of the owner in that behalf, so as to make the latter responsible. The authority of the master of a ship is very large, ... but is subject to several well-known limitations. . . . . It is not contended that the captain had any real authority to sign bills of lading, unless the goods had been shipped. Nor can we discover any ground upon which a party taking a bill of lading by indorsement, would be justified in assuming that he had any authority to sign such bills, whether the goods were

[1] Grant *v.* Norway, 10 C. B. 665; Coleman *v.* Riches, 16 ib. 103; McLean *v.* Fleming, L. R. 2 H. L., S. & D. App. 128; Jessel *v.* Bath, L. R. 2 Ex. 267; Brown *v.* Powell Coal Co., L. R. 10 C. P. 362; Berkley *v.* Watling, 7 Ad. & El. 29; Erb *v.* Great Western Rwy. Co., 5 Duval (Canada), 179.

[2] The Schooner Freeman *v.* Buckingham, 18 How. 182; Pollard *v.* Vinton, 105 U. S. 7; The Lady Franklin, 8 Wall. 325; Friedlander *v.* Texas, etc., Ry. Co., 130 U. S. 416; Batavia Bank *v.* N. Y., etc., R. Co., 106 N. Y. 195.

[3] 7 Ad. & El. 29.

[4] Howard *v.* Tucker, 1 Barn. & Ad. 712. The cases may be reconcilable upon the ground that issuing a receipt for freight charges is within the captain's powers, Grant *v.* Norway, 10 C. B. 680, though he cannot bind the owners by a contract to carry freight free. Ib. 687.

[5] 10 C. B. 665.

on board or not. If, then, from the usage of trade and the general practice of ship-masters, it is generally known that the master derives no such authority from his position as master, the case may be considered as if the party taking the bill of lading had notice of an express limitation of the authority and in that case, undoubtedly, he could not claim to bind the owner by a bill of lading signed, when the goods therein mentioned were never shipped. The very nature of a bill of lading shows that it ought not to be signed until goods are on board, for it begins by describing them as "shipped." The general usage gives notice to all people that the authority of the captain to give bills of lading is limited to such goods as have been put on board and a party taking a bill of lading, either originally or by indorsement, for goods which have never been put on board is bound to show some particular authority given to the master to sign it."[1] The case is of course made doubly strong where a plaintiff consignee, in an action against the owners of the ship, is also the shipper and alleges that he, the plaintiff, caused the goods to be shipped; since, in such a case, the plaintiff can support his issue only by making the defendant, and consequently the latter's agent, his agent and thereby affecting himself as principal with knowledge of the fact that the goods were not shipped.[2] No liability can, of course, be imposed upon the owner by his master's false bill where the former has himself, or by a separate agent, assumed the exclusive performance of a master's duties by loading his own ship.[3] In Canada the rule of Grant *v.* Norway has been adopted, though not without a vigorous dissent, notably in the case of Erb *v.* Great Western Railway Co.,[4] in which the question divided successively the Queen's Bench, the Court of Appeals and the Supreme Court.

[1] Coleman *v.* Riches, 16 C. B. 103; McLean *v.* Fleming, L. R. 2 H. L., S. & Pl. App. C. 128; Jessel *v.* Bath, L. R. 2 Ex. 267; Brown *v.* Powell Coal Co., L. R. 10 C. P. 562.

[2] Berkley *v.* Watling, 7 Ad. & El. 29.

[3] Walter *v.* Brewer, 11 Mass. 99.

[4] 42 Up. Can. Q. B., 90; 3 Tupper, 446; 5 Duval, 179. See, also, Oliver *v.* Great Western Railway Co., 28 Up. Can. C. P. 143.

§ 430. In England it is now provided by the Bills of Lading Act,[1] that every bill of lading in the hands of a consignee or indorsee for valuable consideration, representing goods to have been shipped on board a vessel, shall be conclusive evidence of such shipment as against the master or other person signing the same, notwithstanding that such goods or some part thereof may not have been so shipped, unless such holder of the bill of lading shall have had actual notice at the time of receiving the same, that the goods had not been in fact laden on board; provided that the master, or other person so signing, may exonerate himself in respect of such misrepresentation by showing that it was caused without any default on his part, and wholly by the fraud of the shipper, or of the holder, or some person under whom the holder claims. This Act has, however, no effect in modifying the principle of Grant *v.* Norway. It only makes the bill conclusive against the master or other person *signing* it. In Jessel *v.* Bath,[2] in which the question arose under the statute for the first time, the shipping agent of the defendants, who were charterers of a ship, signed a bill of lading for manganese in bulk, which was found upon arrival to be short of the weight stated in the bill. The plaintiff was an assignee of the bill for value and the action was for damages for non-delivery of the full weight. Bramwell, B., after saying that at common law the defendants would not be liable upon the bill, since their agents had no power to make an admission contrary to the fact, proceeded: "Then, does the statute make any difference? I think not; it seems to me only to mean that the person actually signing the bill of lading shall be liable. If, for instance, an owner had signed it, it would be conclusive against him, but it would not be so against the other owners. If, then, the bill of lading is only conclusive against the person actually signing, the defendants, not being the signers of the bill in question, are not made liable by the statute." This view has been adopted in a subsequent case, and the non-applicability of the statute casting the decision upon the principles of the common law, the rule of Grant *v.* Norway has been sustained.[3] It is to be

[1] 18 & 19 Vict., c. 111, S. 3.

[2] L. R. 2 Ex. 267.

[3] Brown *v.* Powell Coal Co., L. R. 10 C. P. 562.

noted, however, that the decision in Jessel *v.* Bath ought not to be considered as going to the length of exempting from liability all persons except those who actually place their own manual signature upon the bill. An authority to another to sign one's name is as binding as the latter, provided the limits of the authority are not exceeded. The statute would embrace the signature by another of the name of a person who intends that thereby he himself shall be bound.[1]

§ 431. The principle of Grant *v.* Norway was carried a step further in the case of Hubbersty *v.* Ward,[2] in which it was sought to hold the owner of the vessel liable for the negligence of his master in issuing a bill for goods for which a bill had already been given. Counsel for the plaintiffs conceded the principle of Grant *v.* Norway to be correct, but attempted to distinguish the case at bar on the ground that the master is the agent of the owner to give bills of lading for goods on board and his signature to a second bill of such goods is therefore binding on the owner. The court was of the opinion, however, that when the master has signed bills for a cargo actually aboard his vessel, his power as an agent is exhausted and cannot be again exercised to the prejudice of his principal.

§ 432. The same doctrine has been announced by the Supreme Court of the United States. In the case of The Schooner Freeman *v.* Buckingham,[3] that court said: "If the signer of a bill of lading was not the master of the vessel, no one would suppose the vessel bound and the reason is because the bill is signed by one not in privity with the owner. But the same reason applies to a signature made by a master out of the course of his employment. The taker assumes the risk, not only of the genuineness of the signature and of the fact that the signer was master of the vessel, but also of the apparent authority of the master to issue the bill of lading. We say the apparent authority, because any secret instructions by the owner, inconsistent with the authority with which the master appears to be clothed, would not affect third persons. But the master of a vessel has no more apparent authority to sign bills of lading

[1] See remarks of Brett, J., in Brown *v.* Powell Coal Co., L. R. 10 C. P. 568.

[2] 8 Ex. 330.

[3] 18 How. 182.

than he has to sign bills of sale of the ship. He has an apparent authority, if the ship be a general one, to sign bills of lading for cargo actually shipped and he has also authority to sign a bill of sale of the ship when, in case of disaster, his power of sale arises. But the authority in each case arises out of, and depends upon, a particular state of facts. It is not an unlimited authority in the one case more than in the other and his act, in either case, does not bind the owner, when in favor of an innocent purchaser, if the facts upon which his power depended did not exist, and it is incumbent upon those who are about to change their condition upon the faith of his authority, to ascertain the existence of all the facts upon which his authority depends." Grant *v.* Norway has been recognized as the law in our Federal Courts by a steady current of decisions since its adoption in The Schooner Freeman *v.* Buckingham.[1] In Pollard *v.* Vinton,[2] the court quoted approvingly and at length the language used in The Schooner Freeman *v.* Buckingham, and said, "Authority to execute and deliver bills of lading has two limitations; namely, they could only be delivered to shippers and they could only be delivered for freight shipped. Whatever may be the true rule which characterizes actions of officers of a corporation who are placed in control as the governing force of the corporation, which actions are at once a fraud on the corporation and the parties with whom they deal and how far courts may yet decide to hold the corporations liable for such exercise of power by their officers, they can have no controlling influence over cases like the present." The case was that of the issuance of a false bill by the shipping agent of a river steamboat owned by an individual. The court continued: "In the one before us it is a question of pure agency and depends solely on the power confided to the agent. In the other case the officer is the corporation for many purposes." The doctrine of Grant *v.* Norway, thus adopted by the Supreme Court of the United States, prevails also in the courts of several of the States. It has been approved and applied in Massa-

[1] Robinson *v.* Memphis and Charleston R. R. Co., 9 Fed. Reporter, 129; 16 id. 57; The Lady Franklin, 8 Wall. 325; The Loon, 7 Blatch. 244; The Joseph Grant, 1 Biss. 193; Pollard *v.* Vinton, 105 U. S. 7.

[2] 105 U. S. 7.

chusetts,[1] in Illinois,[2] in Ohio,[3] in Maryland,[4] in Louisiana[5] and in Missouri.[6]

In Sears *v.* Wingate[7] it was held that the principle of the owner's non-liability would debar the defendant in an action by several owners for freight actually shipped, from recouping damages for the loss he suffered by failure to deliver the goods specified but not shipped, although the master, who had issued the bill, was also an owner.

§ 433. The principle of Grant *v.* Norway is applicable as well to the case of a false bill issued by a vessel-owner's regular shipping agent, as to that of such a bill issued by a master. This rule was laid down in Pollard *v.* Vinton,[8] in which the bill was issued by the shipping agent of the owners of a steamboat plying regularly between two points on the Mississippi River. The authority of such an agent cannot be greater than that of the master of a vessel transacting business by his ship in all the ports of the world. The same rule was distinctly stated in Jessel *v.* Bath,[9] in which the bill was issued by the ship's agents. Counsel for the plaintiff contended that the cases in which a ship's owner or charterer is held not to be liable for goods not put aboard were not applicable, since a ship's agent's functions are more extended than those of a master,—his signature being with the authority of the owner and in lieu of the latter's own. The court, however, held, upon the authority of what appeared from the case stated, that, in conformity with a practice which has grown up since the introduction of steam navigation, the ship agent had signed instead of the master and that no difference could be established between the efficacy of a signature by the agent and that of a signature by the master.

§ 434. As before intimated, the doctrine (enunciated in Grant *v.* Norway and followed by the Federal courts) has been

[1] Sears *v.* Wingate, 3 Allen, 103.

[2] Stoul *v.* St. L. & P. R. Co., 9 Bradwell, 48.

[3] Dean *v.* King, 22 O. 118.

[4] B. & O. R. R. Co. *v.* Wilkens, 44 Md. 11.

[5] Fellows *v.* The Powell, 16 La. Ann. Rep. 316; Hunt *v.* Miss. Cent. R Co., 29 ib. 446.

[6] Louisiana Bank *v.* Leveille, 52 Mo. 380; Williams *v.* Wilmington and Weldon R. Co., 93 N. C. 42.

[7] 3 Allen (Mass.), 103.

[8] 105 U. S. 7.

[9] L. R. 2 Ex. 267.

rejected in some jurisdictions and the contrary rule established. The latter prevails in New York, Kansas and Nebraska, and probably in Pennsylvania.[1] The ground taken by the courts of those States is that of equitable estoppel, the underlying principle being that well-known rule, that where one of two innocent parties must suffer by the act of a third, the loss must fall upon that one of them who, by reposing confidence in, and granting authority to, the latter, has furnished him with the means of doing the injury. A leading New York case upon this point is that of Armour *v.* Michigan Central Railroad Co.[2] In that case an agent of the defendant company, who had the ordinary authority, issued bills to one Michaels, upon the latter's indorsement to the defendant company and delivery to its agent of a warehouse receipt, which was forged. The agent knew nothing of the forgery, but knew that the goods specified had not been delivered to the company. No inquiry was made as to the genuineness of the warehouse receipts, although the agent was informed by Michaels at the time of the delivery of the bills that the latter were to be used as collateral security at the plaintiffs' bank. Michaels attached the bills to drafts upon the plaintiffs, which, upon delivery, the latter paid, upon the faith and credit of the bills. The court said that so far as the case of Grant *v.* Norway conflicted with the doctrine that where one of two innocent persons must suffer in a case like that at bar, that person must bear the loss who reposed the confidence, it must be deemed to be overruled, although it was attempted to distinguish that case from the one under consideration, on the ground that in the former the party to whom the bill was originally issued and who assigned it to the plaintiff, knew that the issue was without authority. The case at bar would have been essentially different had the plaintiffs been the assignees of holders, who knew of the forgery, by which the issue was induced. Under the actual circumstances, the case fell within the rule that a *bona fide* purchase for value of a non-negotiable *chose* in action from one upon whom the owner

[1] See Brooke *v.* N. Y., L. E. & W. R. Co., 16 W. N. C. 514; S. C. 108 Pa. 529.

[2] 65 N. Y. 111.

has by assignment conferred the apparent absolute ownership, confers a valid title, as against the real owner, who is estopped from asserting a title in hostility.[1] The representations made to the plaintiffs in the case at bar were made to them directly. The bills were not issued to Michaels and by him assigned to the plaintiffs. The goods were consigned to the plaintiffs themselves and the bills issued with the expectation that they would be acted upon by the plaintiffs. It will be seen, therefore, that the question whether the doctrine of estoppel is to be applied in favor of a *bona fide* transferree of a false bill was not decided. The point decided by the case was that a mistaken representation made in a bill of lading by an agent of a railroad company to a party with whom the company stands in direct relations and who is himself innocent, inducing a well-founded belief that the company has received the goods specified, prevents the company's denying that it received them, though, in point of fact, it did not receive them.

The same principle has been applied in a case, which was decided in Pennsylvania, although the contractual rights of the parties arose in New York and were, therefore, adjusted in accordance with the law of that State.[2] The shipping agent of the defendant company, with the knowledge and connivance of the plaintiff's consignor, fraudulently issued to the latter a bill of lading for a carload of goods which had not been received and which there was no intention to deliver. The consignor drew a draft upon the plaintiff and attached to it the fraudulent bill. The draft was duly presented and was paid by the plaintiff, upon the faith and credit of the bill. The railroad company was held liable and the case ruled by Armour *v.* The Railroad Company. Although the court was nominally guided by the *lex loci contractus*, it adopted the latter with such clearly expressed approval as to render the adoption of it as the *lex fori*, when occasion may be presented, a matter of high probability. The court said, indeed: "We are

[1] Moore *v.* Metropolitan Bank, 55 N. Y. 41; Griswold *v.* Haven, 25 N. Y. 604; McNeil *v.* Tenth National Bank, 46 ib. 325; Batavia Bank *v.* N. Y., etc., R. Co., 106 ib. 195. See also 26 Am. L. Reg. (N. S.) 576 n.

[2] Brooke *v.* N. Y., L. E. & W. R. Co., 16 Weekly Notes of Cases, 514; S. C. 108 Pa. 529.

not prepared to admit there is any material difference between the laws of the two States applicable to the case." In Brooke *v.* The Railroad Company, as in the New York case by which it was governed, no intimation is given as to the right of a *bona fide* transferree of such a bill for value to invoke the rule of estoppel against the principal. In the former case the plaintiff maintained the same directness of relation to the railroad company as the plaintiff in the latter. So in a recent case in Kansas the duly authorized agent of a railroad company, at the instance of a shipper, issued, in the name of the corporation, two original bills of lading, each of the same terms, tenor, and effect, for the same consignment of goods and each of them was transferred by the shipper to different parties, who respectively accepted them in good faith and for value. It was the custom of the railroad company, known to the transferrees, to issue but one bill of lading and the agent had no authority to issue more. The holder of one of the bills having obtained the goods from the company upon the presentation of his bill and with no knowledge upon the part of the company that another bill was outstanding, the holders of the latter, upon the company's refusal to make good their loss, brought suit against it—the shipper being insolvent and having absconded. The holder was allowed to recover the amount of his advances.[1]

This case is an important one, as embodying a decision of the point which is touched upon only by dicta in Armour *v.* The Railroad Company and to which those dicta are adverse. Although it does not appear whether the distinction recognized by the latter was raised in argument in this case and although it was not specially adverted to by the court, the decision must be considered as full to the point that not only a party upon whom the agent of such a corporation directly perpetrates such a fraud, but one who is simply the innocent buyer, in the regular course of commercial transactions, of such a false and fraudulent non-negotiable *chose* in action, is entitled to protection against the corporation's negligence in employing a dishonest agent. The court, indeed,

[1] Wichita Bank *v.* A., T. & S. R. Co., 20 Kan. 519.

expressly assented to the proposition, that a bill of lading is not a negotiable instrument, but held that the defendant's liability did not depend upon the negotiable character of the bill. "The principle of estoppel does and ought in such cases to apply." It would be difficult to distinguish the position of the plaintiff in this case from that of the hypothetical plaintiff whose right of recovery the court seemed to so strongly doubt in Armour *v.* The Railroad Company.

In Nebraska a later decision follows the rule thus established in Kansas and goes to the same length in holding a general purchaser of such a security entitled to recovery.[1]

§ 435. In Maryland it is provided by statute[2] that all bills of lading issued by any person or corporation, or by any agent or officer of any person or corporation authorized to issue the same on his or its behalf, or authorized or permitted by such person or corporation to issue like instruments on his or its behalf, shall be conclusive evidence in the hands of any *bona fide* holder for value, who shall have become such, without actual notice to the contrary, that all of the goods described therein had been actually received by, and were actually in the possession and custody of such person or corporation at the time of issuing the bill, according to the tenor thereof, and for the purpose and to the effect therein stipulated, notwithstanding that the fact may have been otherwise and that such agent or officer may have had no authority to issue any such instrument except for goods actually received and in possession at the time of such issue.

In Pennsylvania it is provided by statute[3] that no warehouseman, wharfinger "or other person" shall issue any receipt "or other voucher" for goods to persons purporting to be the owners of such goods, unless the latter have been actually received "into store or upon the premises of" such warehouseman or other person and shall be on store or on the premises and under his control at the time of issuing such receipt. The 5th section of the Act prescribes a penalty of fine or imprisonment for the

[1] Sioux City and Pacific Ry. Co. *v.* First Nat. Bank of Fremont, 10 Neb. 556.

[2] 1876, C. 2, S. 1; Rev. Code, 1878, p. 298.

[3] Act of Sept. 24, 1866, P. L. 1363. Purdon's Dig. 145.

violation of the Act, and provides for the recovery of damages by the party aggrieved by its violation, whether the person violating it shall have been convicted of fraud under the Act or not. Whether or not this prohibition of the Act applies to carriers as well as to warehousemen, etc., has not as yet been decided.

A similar prohibition has been enacted in Maryland.[1] The statute of that State provides that no person or corporation, or agent, or officer of any person or corporation in that State shall issue any bill of lading, receipt, acknowledgment, or voucher whatsoever, for goods, chattels or commodities of any kind, to be transported on land or water, or on both, until and unless the whole of the said goods, chattels and commodities shall have been actually received to be transported by such person or corporation, at the time when such instrument shall be issued. The violation of this provision is made a misdemeanor punishable by fine.

The language of the Missouri statute[2] on the same subject is: "No master, owner or agent of any boat or vessel of any description, forwarder or officer, or agent of any railroad, transfer or transportation company, or other person, shall sign or give any bill of lading, receipt or other voucher or document, for any merchandise or property, by which it shall appear that such merchandise or property has been shipped on board of any boat, vessel, railroad car, or other vehicle, unless the same shall have been actually shipped and put on board, and shall be at the time actually on board or delivered to such boat, vessel, car or other vehicle, to be carried and conveyed as expressed in such bill of lading, receipt or other voucher or document." Fine or imprisonment is imposed as the penalty for a violation of this prohibition; and a provision similar to that of Pennsylvania is made with regard to the recovery of damages.

The Wisconsin statute[3] provides that "any warehouseman, wharfinger, master of a vessel or boat, or any officer, agent or clerk of any railroad, express or transportation company, who shall issue any receipt, bill of lading, voucher or other document to any person purporting to be the owner thereof, or as

[1] 1876, C. 262, S. 1; Rev. Code, 1878, p. 299.

[2] R. S. 1879, S. 557, p. 88.

[3] Ib. 1878, S. 4424.

security for any loan or indebtedness, for any goods, wares, merchandise, lumber, timber, grain, flour or other property, produce or commodity, unless at the time of issuing the same such property shall have been actually received or shipped, according to the terms and meaning of such receipt, bill of lading, voucher or other document so issued . . . . . shall be punished by imprisonment," etc.

In New York it is provided[1] that "no master, owner or agent of any vessel or boat of any description, or officer or agent of any railroad company, or other person, shall sign or give any bill of lading, receipt or other voucher or document, for any merchandise or property, by which it shall appear that such merchandise or property has been shipped on board any vessel, boat or railroad car, unless the same shall have been actually shipped and put on board, and shall be at the time actually on board or delivered to such vessel, boat or car to be carried and conveyed as expressed in such bill of lading, receipt or other voucher or document."

§ 436. It is, however, an important modification of the principle under discussion that a bill of lading, issued by either a shipmaster or an inland carrier, may give a valid title to goods not in the possession of the carrier at the time of such issue, but subsequently received for transportation in accordance with the contemplation of the parties as expressed in the bill.[2] Where, through inadvertence or otherwise, the bill is signed before the goods are put on board or received for shipment by rail or otherwise, upon the faith and assurance that they are about to be so delivered; if they are subsequently placed in the carrier's hands as and for the goods described in the bill, the latter will operate against the carrier by way of relation and estoppel and a consignee who receives it and accepts drafts on the faith of the consignment has as valid and effectual a title to the goods as could be obtained by an actual delivery of the goods themselves. Mr. Justice STRONG, delivering the opinion

[1] R. S., vol. iii., 7th ed., p. 2259; L. 1858, C. 326.

See Addenda for full text of these acts.

[2] Rowley *v.* Bigelow, 12 Pick. 307; The Idaho, 93 U. S. 575; Halliday *v.* Hamilton, 11 Wall. 560; The Farwell, 8 Biss. 61; Robinson *v.* Memphis, etc., R. Co., 16 Fed. Rep. 57.

of the Supreme Court of the United States, in the case of The Idaho,[1] said: "We do not say that a title to personal property may not be created between the issue of a bill of lading therefor and its delivery to the ship, which will prevail over the master's bill, but, in the absence of any such intervening right, a bill of lading does cover goods subsequently delivered and received to fill it, and will represent the ownership of the goods." Property may be delivered on board a vessel so as to be bound by a previously signed bill of lading and to become the subject on which it shall operate, at any time while the vessel is taking in her cargo for the voyage contemplated, as described in the bill, and before she sails upon it.[2] This rule is probably unexceptionable, as stated in the terms used, in its application to ocean transportation, but in the case of Halliday *v.* Hamilton[3] a still greater latitude was allowed in the time and mode of delivery to satisfy the terms of the previously issued bill and give a valid title thereunder. In that case the shipper, a resident of St. Louis, received at that place from the agent of a steamer about to go down the Mississippi River to New Orleans, a bill of lading for merchandise lying at a landing on the river more than a hundred miles below the point of departure, consigned to a party in New Orleans. The steamer stopped at the designated point and took the goods aboard. This was held to constitute a valid transfer of the property to the consignees, as against an unpaid vendor of the goods, who issued an attachment subsequently to such delivery.

§ 437. This retroactive effect of a bill of lading is not prevented by the existence of a statute which prohibits the issuance of a bill before the receipt of the goods. Such a statute does not forbid the curing of an illegal bill by supplying goods, the receipt of which has been previously acknowledged. If held to make a delivery of goods to fill a fraudulent bill of lading inoperative for that purpose, it would be rendered a means of furthering the fraud it was designed to prevent.[4]

[1] 93 U. S. 575.
[2] Rowley *v.* Bigelow, 12 Pick. 307.
[3] 11 Wall. 560.
[4] The Idaho, 93 U. S. 575.

CHAPTER XXXII.

THE NEGOTIABILITY OF THE BILL OF LADING.

The bill is not "negotiable" in the ordinary sense of that term, § 438.
The nature of the interest or title of which the bill is a muniment, §§ 439, 440, 441, 442.
Statutes relating to the negotiability of bills of lading, §§ 443, 444, 445, 446, 447, 448, 449, 450, 451.
The construction of statutes relating to the negotiability of the bill, §§ 452, 453, 454.
Rights of holders of different parts of a bill issued in sets, §§ 455, 456, 457, 458, 459.

§ 438. It may be readily gathered from the principles already discussed that the bill of lading cannot be regarded (unless by virtue of statutory enactment) as an absolute muniment of title, *i. e.*, a document that vests in its holder a right of possession which cannot be assailed or defeated. This is true in many instances although the holder obtained the bill in good faith and for a valuable consideration. The negotiability of the bill has been the subject of numberless discussions involving the rights of the holder; but the word "negotiable," except where the law-making power has abrogated the rules of the common law and mercantile usage, is entirely out of place in such controversies unless stripped of its ordinary significance. A large number of *dicta* have been uttered by eminent authorities in assertion of the negotiability of the bill of lading, but no case can be found, unless arising under a special statute, in which a bill of lading has been treated as an instrument which is negotiable in the same sense as bills of exchange and promissory notes are negotiable. All broad assertions of the negotiability of the bill of lading, when examined in the light of their context and of their actual application to the very cases in which they were unguardedly made by the court, will be found equivalent merely to a statement that the bill is

transferrable by indorsement and delivery and that such indorsement and delivery transfers to the indorsee or holder *such rights to, or property in the goods as it was the intention of the parties, gathered from all the circumstances, to pass.* This, except, as before stated, in those cases where a larger effect has been given to such transfers by statute, is the broadest statement of the "negotiability" of the bill of lading which is warranted by the cases. A review of particular authorities to establish the negative proposition that by the commercial law these instruments are not negotiable in the ordinary sense of that term, is neither feasible nor necessary. Its correctness is sufficiently manifested as a necessary corollary of the discussion of particular questions arising out of the issuance or transfer of the bill. To hold that the bill has negotiability of the broad character sometimes claimed for it is to hold that there can be no such thing as an ineffectual indorsement of it, whereas, as the succeeding discussion shows, no title is conveyed by the indorsement and delivery of a bill of lading, even to a *bona fide* purchaser for value, where the indorser had none.

§ 439. The discussion of the negotiability of the bill of lading has involved, not only the question as to the superiority of the holder's title to those of other claimants of the goods, but also the question as to the extent and character of his ownership or interest. The answer to this question is found in the statement of the effect of transferring a bill, found in the preceding section. The character of the transferree's interest in the goods represented by the bill of lading is that intended by the parties or implied by law from the particular circumstances of each transaction. There is nothing in the possession of the bill which can give to its holder greater or higher rights over the property than were intended in the express or implied contract under which it was transferred. Even when there are no conflicting claims to the property, the mere transfer of the bill of lading does not pass the complete legal ownership so as to impose upon the transferree all the liabilities with respect to the property which would attach to the ownership of an ordinary purchaser, or to invest him with all the latter's rights.

§ 440. The language of opinions from the time of that deliv-

ered in Lickbarrow *v.* Mason[1] to the present day, as well as much of the phraseology in contemporary text-books, has been of the broadest character in stating the effect of the transfer of the bill of lading to be the passing of "the property in the goods," "the complete legal ownership," "the absolute legal title," etc. Here, too, a careful examination of the cases themselves will disclose the fact that the principles thus sweepingly enunciated were laid down with a particular question or set of questions in view and are not borne out by the decisions themselves as of universal application. As between an unpaid vendor and the vendee's *bona fide* indorsee, or as between a *bona fide* indorsee and other claimants, the transfer of the bill undoubtedly passes *property* in the goods as effectually as would its manual delivery, but the transferree has only such property in the goods as it is necessary to confer upon him in order to effectuate the purpose of the transfer. An agent to whom the bill is indorsed to enable him to effect a stoppage *in transitu*, or a banker to whom six thousand dollars worth of goods may be pledged to secure a loan of five thousand cannot be considered as vested with such "complete legal ownership" as they would have if their contract with the transferree were one of purchase and sale. So, where the extent of the transferree's property in the goods becomes a question involving the extent of his liabilities with respect to the goods instead of his rights, the proposition that the transfer of the bill passes "the absolute legal ownership" is found to be inaccurate.

§ 441. This very clearly appears from the cases arising upon the English Bills of Lading Act, 18 and 19 Vict. C. 111, or, indeed, from the cases arising previously in which it was held that the transfer of a bill of lading did not transfer the contract so that upon a refusal to deliver the goods the transferree might sue for a conversion, but could bring no action upon the contract contained in the bill and, on the other hand, assumed none of the liabilities created by the contract, as for freight.[2] The statute, after reciting the pre-existing law and providing

[1] 5 T. R. 683.

[2] Howard *v.* Shepherd, 9 C. B. 297; Thompson *v.* Dowing, 14 M. & W. 403; Sargent *v.* Morris, 3 B. & Ald. 277; Sanders *v.* Vanzeller, 4 Q. B. 260; Tindall *v.* Taylor, 4 El. & Bl. 219.

that every indorsee of the bill of lading "to whom the property in the goods therein mentioned shall pass, upon or by reason of such indorsement," shall have vested in him the right of suit, etc., further provides that he "shall be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself." The statute itself, it is to be observed, in specifying what indorsees are to be included within its purview, gives implied recognition to the fact that a transfer of the bill of lading does not of itself invariably transfer the complete legal ownership of the goods, since it limits its application to indorsees "to whom the property shall pass," and the same fact has been distinctly recognized by the courts in interpreting the statute.

§ 442. The latest important decision upon this statute, and as well the latest important English discussion of the effect of the transfer as passing property in the goods, independently of the statute, is that contained in Sewell *v.* Burdick,[1] decided in the House of Lords in 1884. In that case goods were shipped under bills of lading making them deliverable to the shipper or assigns. After the goods had arrived and had been warehoused, the shipper indorsed the bills of lading in blank and deposited them with Sewell as security for a loan. Sewell never took possession of or dealt with the goods. The ship-owners brought an action against Sewell for freight. It was held that the "property" in the goods did not pass to Sewell within the meaning of the Bills of Lading Act, so as to make him liable for the freight. The previous interpretations of the statute[2] were reviewed and it was shown to be by them established that the transferree obtains the complete legal ownership of the goods, which under the act gives him the rights and imposes upon him the liabilities of an absolute proprietor, not by virtue of the indorsement or delivery of the bill, but by virtue of an election, which he might or might not make "to complete his potential and inchoate title by taking possession of the goods, and so placing himself toward the ship-owner in the position of proprietor." The "property" passed to the transferree was held to be spe-

[1] L. R. 10 H. L. 74.

[2] Fox *v.* Nott, 6 H. & N. 637; Smurthwaite *v.* Wilkins, 11 C. B. (N. S.) 847; The Figglia Maggiore, L. R. 2 Admiralty & Ecclesiastical, 106; The Freedom, L. R. 3 P. C. 594.

cial, not general, "the shipper retaining (whether at law or in equity) the real and substantial property in the goods, subject to the security. The case made on the statement of claim," said Lord Blackburn, "was that 'the' property had passed upon or by reason of the indorsement to the defendants. . . . . I think that all the judges below were of opinion that if the right reserved was the general right to the property at law, what was transferred being only a pledge (conveying, no doubt, a right of property and an immediate right of possession, so that the transferree would be entitled to bring an action at law against any one who wrongfully interfered with his right), though '*a*' property, and 'a' property against the indorser, passed 'upon and by reason of the indorsement,' yet '*the*' property did not pass. And I agree with them." His Lordship then proceeded to discuss the opinions expressed in the leading cases of Glynn *v.* East and West India Dock Company,[1] and in Lickbarrow *v.* Mason,[2] and observed that neither the statement of the custom of merchants in the special verdict in the latter case, nor the opinion of Mr. Justice Buller, "justifies the inference that the indorsement of a bill of lading for a valuable consideration must pass the entire legal property, whatever was the intention of the parties," and quoted the opinion of Lord Ellenborough in Newson *v.* Thornton,[3] that "a bill of lading, indeed, shall pass the property upon a *bona fide* indorsement and delivery, *where it is intended so to operate*, in the same manner as a direct delivery of the goods themselves would do, *if so intended.* But it cannot operate further." "In Glynn *v.* East and West India Dock Company," said Lord Blackburn, "Brett, L. J., says (speaking of an opinion of Willes, J.): 'To say that an indorsement of a bill of lading for an advance is only a pledge, seems to me to be inconsistent with what has always been considered to be the result of Lickbarrow *v.* Mason, namely, that such an indorsement passes the legal property,' by which I understand him to mean the whole legal property. But neither in that case nor in the one now at bar does he refer to any authority to that effect. Expressions used by judges

[1] 6 Q. B. D. 475.
[2] 5 T. R. 683.
[3] 6 East, 40.

have been cited, which, I think, only show that they did not carefully consider their language, where no question of the kind before us was under discussion. And as far as I know, there is no decision subsequent to Lickbarrow *v.* Mason which proceeds on such a ground."

Lord BRAMWELL said: "It is found as a fact, and rightly found, as is admitted, that all that was *intended in the transaction* was a pledge. This would give the appellants *a* property, but, as put by BOWEN, L. J., not *the* property. The Master of the Rolls thinks that Lickbarrow *v.* Mason, or rather the opinion of BULLER, J., shows that when a bill of lading is indorsed to give any title to the transferree, the entire property is passed. . . . I think that authority and reason are against it. The cases do not, in my opinion, justify the contention. As to the reason and principle which should govern, I ask, why should the transfer of the bill of lading have a greater effect, contrary to the parties' intention, than the handing over of the chattels themselves? . . . . The truth is, the property does not pass by the indorsement, but by the contract in pursuance of which the indorsement is made."

This decision of the highest court in the greatest commercial jurisdiction in the world would seem to leave no doubt that a bill of lading is a muniment of only such a title as it was the express or implied intention of the parties to convey and receive.

§ 443. In many of the States statutes have been enacted giving to bills of lading a negotiable or quasi-negotiable character which they do not possess at common law. They are set forth in brief in the following paragraphs, the full text appearing in the Addenda to this volume:—

Arkansas.[1]—Warehousemen, wharfingers, and transportation companies are forbidden to issue receipts for goods until the goods are under their control. If duplicate receipts are given, the word "duplicate" must be written across the face. Such receipts and all bills of lading, transportation receipts, and contracts of affreightment are made negotiable. Any violation of the act is declared a criminal offence.

[1] Acts of 1887, No. 60, p. 84.

§ 444. *California.*[1]—All the title to the freight which the first holder of a bill of lading had when he received it passes to every subsequent indorsee thereof in good faith and for value, in the ordinary course of business, with like effect and in like manner as in the case of a bill of exchange.

When a bill of lading is made to "bearer," or in equivalent terms, a simple transfer thereof, by delivery, conveys the same title as an indorsement.

§ 445. *Dakota.*[2]—All the title to the freight which the first holder of a bill of lading had when he received it passes to every subsequent indorsee thereof, in good faith and for value, in the ordinary course of business, with like effect, and in like manner as in the case of a bill of exchange. When a bill of lading is made to bearer, or in equivalent terms, a simple transfer thereof by delivery conveys the same title as an indorsement.

§ 446. *Maryland.*[3]—All bills of lading and all receipts, vouchers or acknowledgments whatsoever in writing, in the nature or stead of bills of lading for goods, chattels, or commodities of any kind, to be transported on land or water, or on both, which shall be executed in this State, ... shall be and they are hereby constituted and declared to be negotiable instruments and securities, unless it be provided in express terms to the contrary on the face thereof, in the same sense as bills of exchange and promissory notes, and full and complete title to the property in said instruments mentioned or described, and all right and remedies incident to such title, or arising under or derivable from the said instruments, shall inure to and be vested in each and every *bona fide* holder thereof for value, altogether unaffected by any rights or equities whatsoever of or between the original or any other prior holders of or parties to the same, of which such *bona fide* holder for value shall not have had actual notice at the time he became such.

Every instrument of those mentioned and described in the preceding section, which shall be issued by any person or corporation, or by any agent or officer of any person or corpora-

[1] Civ. Code, §§ 2127, 2128.

[2] Compiled Laws of Dakota, 1887, §§ 3855, 3857.

[3] 1876, C. 262, § 1; Rev. Code, 1878, p. 298, etc.

tion authorized to issue the same on his or its behalf, or authorized or permitted by such person or corporation to issue like instruments on his or its behalf for goods, chattels, or commodities actually received for transportation or held on storage, as the case may be, shall be conclusive evidence in the hands of any *bonâ fide* holder for value of such instrument, who shall have become such without actual notice to the contrary, that all of the goods, chattels, and commodities in said instrument mentioned or described had been actually received by, and were actually in the possession and custody of, such person or corporation at the time of issuing the said instrument according to the tenor thereof, and for the purposes and to the effects therein stipulated or provided, notwithstanding that the fact may be otherwise, and that such agent or officer may have had no authority to issue any such instrument on behalf of his said principal, except for goods, chattels, or commodities actually received and in possession at the time of such issue.[1] Any instrument declared negotiable by this article shall be held and taken to have been issued, within the meaning of this article, when it shall have been signed and shall have been delivered out of the custody of the person or corporation to be charged or bound by the same, or of his or its agent or officer aforesaid.[2]

§ 447. *Minnesota.*[3]—Warehouse receipts and bills of lading shall be negotiable, and may be transferred by indorsement and delivery of receipt or bill of lading; and any person to whom the said receipt or bill of lading may be transferred, shall be deemed and taken to be the owner of the goods, wares, or merchandise therein specified, so as to give security and validity to any lien created on the same, subject to the payment of freight and charges thereon. All warehouse receipts, or bills of lading, which shall have the words "not negotiable" plainly written on the face thereof shall be exempt from the provisions of this act.

§ 448. *Missouri.*[4]—All receipts issued or given by any warehouseman, or other person or firm, and all bills of lading, trans-

[1] Ib. § 2.

[2] Ib. § 4.

[3] Statutes of Minnesota, 1878, p. 1013.

[4] R. S., 1879, §§ 558, 559, p. 88; ib. 1889, ch. 18, § 744.

portation receipts and contracts of affreightment issued or given by any person, boat, railroad, or transportation or transfer company, for goods, wares, merchandise, grain, flour, or other produce, shall be and are hereby made negotiable by written indorsement thereon, and delivery in the same manner as bills of exchange and promissory notes; and no printed or written conditions, clauses, or provisions inserted in or attached to any such receipts, bills of lading, or contracts shall in any way limit the negotiability or affect any negotiation thereof, nor in any manner impair the rights and duties of the parties thereto, or persons interested therein; and every such condition, clause, or provision purporting to limit or affect the rights, duties, or liabilities created or declared in this act, shall be void and of no force or effect.

All bills of lading and transportation receipts of every kind, given by any carrier, boat, vessel, railroad, transportation, or transfer company, may be transferred by indorsement in writing thereon, and the delivery thereof so indorsed; and any and all persons to whom the same may be so transferred shall be deemed and held to be the owner of such goods, wares, merchandise, grain, flour, or other produce or commodity, so far as to give validity to any pledge, lien, or transfer given, made, or created thereby, as on the faith thereof, and no property so stored or deposited, as specified in such bills of lading or receipts, shall be delivered, except on surrender and cancellation of such receipts and bills of lading, provided, however, that all such receipts and bills of lading, which shall have the words "not negotiable" plainly written or stamped on the face thereof shall be exempt from the provisions of this act.

It is provided by the criminal code of Missouri[1] that if any commission merchant, agent, or other person, storing or shipping any grain, flour, or other produce or commodity, or any person to whom any such property is consigned, and who shall come in possession of a bill of lading or warehouse receipt for such property, for or on account of another person or other persons, shall hypothecate, negotiate, or pledge such bill of lading or warehouse receipt, without the written authority

[1] R. S. 1879, § 1348, p. 237.

therefor of the owner or consignor of such property; or if having so disposed of any such bill of lading or warehouse receipt, shall fail to account for or pay over the proceeds thereof forthwith to his principal or the owner of such property, in either or any of such cases he shall be adjudged guilty of fraud, and shall on conviction be punished by fine not exceeding five thousand dollars, or by imprisonment in the penitentiary for a term not exceeding five years, or by both such fine and imprisonment: provided that nothing herein shall be construed to prevent such consignee or other person lawfully possessed of such bill of lading or warehouse receipt from pledging the same to the extent of raising sufficient means thereby to pay charges for storage and shipment, or advances drawn for on such property by the owner or consignor thereof; and a draft or order by such owner or consignor for advances, shall be held and taken to be "written authority," within the meaning of this section, for the hypothecation of such bill of lading or warehouse receipt, to the extent, and only to the extent of raising the means to meet such draft, and to pay such freights and storage.

§ 449. *New York.*[1]—Bills of lading given for any goods, wares, merchandise, grain, flour, produce, or other commodity, may be transferred by indorsement thereof, and any person to whom the same may be so transferred shall be deemed and taken to be the owner of the goods, wares, and merchandise therein specified, so far as to give validity to any pledge, lien or transfer made or created by such person or persons; but no property shall be delivered except on surrender and cancellation of said original bill, or the indorsement of such delivery thereon in case of partial delivery. All bills of lading, however, which shall have the words "not negotiable" plainly written or stamped on the face thereof, shall be exempt from the provisions of this section.

In the penal code of New York[2] it is provided that a person carrying on the business of a warehouseman, wharfinger or

[1] R. S. vol. III., 7 ed. p. 2260; L. 1858, c. 326, § 6, as amended by L. 1859, c. 353, ib; see Colgate *v.* Pennsylvania Co., 102 N. Y. 120.

[2] Chap. 13 of the Penal Code, sec. 633; see 629; see. Colgate *v.* Pennsylvania Co., 102 N. Y. 120.

other depositary of property who delivers to another any merchandise for which a bill of lading, receipt or voucher has been issued, unless such receipt or voucher bears upon its face the words "not negotiable" plainly written or stamped, or unless such receipt is surrendered to be cancelled at the time of such delivery, or unless in the case of a partial delivery, a memorandum thereof is indorsed upon such receipt or voucher, is punishable by imprisonment not exceeding one year, or by a fine not exceeding one thousand dollars, or by both.

§ 450. *Pennsylvania.*[1]—Warehouse receipts and bills of lading shall be negotiable, and may be transferred by indorsement and delivery of said receipt or bill of lading; and any person to whom the said receipt or bill of lading may be so transferred, shall be deemed and taken to be the owner of the goods, wares, and merchandise therein specified, so as to give security and validity to any lien created on the same subject to the payment of freight and charges thereon; and no property on which such lien may have been created, shall be delivered by said warehouseman, wharfinger, or other person, except on the surrender and the cancellation of said original receipt or bill of lading; or in the case of a partial sale or release of the said merchandise, by the written assent of the holder of said receipt or bill of lading indorsed thereon.

All warehouse receipts or bills which shall have the words "not negotiable" plainly written or stamped on the face thereof, shall be exempt from the provisions of this act.

§ 451. *Wisconsin.*[2]—Warehouse receipts, bills of lading, or railroad receipts given for any goods, wares, merchandise, lumber, timber, grain, flour, or other produce or commodity, stored, shipped, or deposited with any warehouseman, wharfinger, vessel, boat, or railroad company, or other person, on the face of which shall not be plainly written the words "not negotiable," may be transferred by delivery, with or without indorsement thereof; and any person to whom the same may be so transferred shall be deemed and taken to be the owner of the goods, wares, and

[1] Penna. Act, 24 Sept., 1866; P. L. 1363.

[2] R. S., 1878, §§ 4194, 4424. & B.'s Annotated Statutes, 1889, §§ 4194, 4425.

merchandise therein specified, so far as to give validity to any pledge, lien, or transfer made or created by such person or persons; but no such property shall be delivered except on surrender and cancellation of said original receipt or bill of lading, or the indorsement of such delivery thereon, in case of partial delivery.

Any receipt, bill of lading, voucher, or other document issued by any warehouseman, wharfinger, master of a vessel or boat, or any officer, agent, or clerk of any railroad, express, or transportation company, shall be transferable by delivery thereof, without indorsement or assignment, and any person to whom the same is so transferred, shall be deemed and taken to be the owner of the property therein specified, so far as to give validity to any pledge, lien, or transfer, made or created by such person, unless such receipt, bill of lading, voucher, or other document shall have the words "not negotiable" plainly written or stamped on the face thereof.

§ 452. By a comparison of these statutes it will be observed that their pivotal language varies in each case. The distinction drawn by two recent decisions from this variation in their terms is of the utmost importance. It is clear from these decisions that the statutes are to be divided into two classes, those which prescribe the manner in which bills of lading may be transferred, and those which prescribe the effect of a transfer in the designated manner. It is clearly established that a statute making bills of lading negotiable by indorsement and delivery in the same manner as bills of exchange and promissory notes, or making them negotiable and transferable by indorsement and delivery, does not attach to their indorsement and delivery all the consequences flowing from the negotiation of bills of exchange and promissory notes. The quality conferred upon these instruments by such a statute is held to be negotiability alone, that is, the capability of being transferred in the manner indicated so as to give the transferree a right to bring suit for the goods, or equivalent damages, in his own name; not those qualities which are not essential to mere negotiability, but are additional incidents of bills of exchange and promissory notes. The peculiar qualities of the latter do not inhere in them as negotiable instruments, but have been attached to them by the law mer-

chant in order that they may perform exceptional functions in the commercial world. In other words, an instrument which may be negotiated is not by virtue of that a sacred instrument in favor of *bona fide* holders for value without notice.

§ 453. It is a well-established rule of the commercial law that if a bill of exchange or promissory note, indorsed in blank or payable to bearer, be lost or stolen and be purchased from the finder or thief without any knowledge on the purchaser's part of want of ownership in the vendor, the *bona fide* purchaser may hold it against the true owner and may hold it when he took it negligently and without looking beyond the instrument. Nothing but *mala fides* will defeat his right.[1] This rule however is laid down not by reason of the mere fact that a bill or note is negotiable. At all events the case of Shaw *v.* The Railroad Company[2] decides either, (1) that this rule is not applicable to a stolen bill of lading or, (2) that a purchaser of such a bill who has reason to believe that his vendor is not the owner of the bill, or that it was held to secure the payment of an outstanding draft, is not such a *bona fide* purchaser, as is entitled to hold the merchandise covered by the bill against its true owner. However, although the fact that the purchaser's conduct bordered very closely upon *mala fides* seems to have considerably influenced the court in this case, the decision may be safely accepted as establishing the first point. The court said, "In the present case there was more than mere negligence on the part of [the purchaser of the bill], more than mere reason for suspicion," but in the preceding paragraph of the opinion it had used this language: "Bills of lading are regarded as so much cotton, grain, iron, or other articles of merchandise. The merchandise is very often sold or pledged by the transfer of the bills which cover it. They are, in commerce, a very different thing from bills of exchange and promissory notes, answering a different purpose and performing different functions. It cannot be, therefore, that the statute which made them negotiable by indorsement and delivery, or negotiable *in the same manner*

[1] Goodman *v.* Harvey, 4 Ad. & E., 110; Matthews *v.* Poythress, 4 Ga. 870; Goodman *v.* Simonds, 20 How. 287.
343; Murray *v.* Lardner, 2 Wall.

[2] 101 U. S. 557.

as bills of exchange and promissory notes are negotiable, intended to change totally their character, put them *in all respects* on the footing of instruments which are the representatives of money and charge the negotiation of them with all the consequences which usually attend or follow the negotiation of bills and notes. Some of these consequences would be very strange, if not impossible, such as the liability of indorsers, the duty of demand *ad diem*, notice of non-delivery by the carrier, etc., or the loss of the owner's property by the fraudulent assignment of a thief. If these were intended, surely the statute would have said something more than merely make them negotiable by indorsement. No statute is to be construed as altering the common law, farther than its words import. It is not to be construed as making any innovation upon the common law which it does not fairly express. Especially is so great an innovation as would be placing bills of lading on the same footing in all respects with bills of exchange not to be inferred from words that can be fully satisfied without it. The law has most carefully protected the ownership of personal property, other than money, against misappropriation by others than the owner, even when it is out of his possession. This protection would be largely withdrawn if the misappropriation of its symbol or representative could avail to defeat the ownership, even when the person who claims under a misappropriation had reason to believe that the person from whom he took the property had no right to it."

§ 454. Where, however, as in Maryland, the language of the statute is emphatically to the point that bills of lading shall not only be transferable by indorsement and delivery, but that the effect of such indorsement and delivery shall be the same as in the case of a bill of exchange, there can be little doubt that, so far as the same questions of title can arise in the one case as in the other, the answers to those questions must be the same. It has never been supposed that such a statute contemplated such an application of its own language as would be manifestly absurd. The differences between the two classes of instruments are inherent, and the rights and obligations attendant upon the negotiation of one cannot in the nature of things be regulated in the precise way in which they are regulated in the case of

the other. It is, however, undoubtedly true that the governing object of such a statute is to vest in any *bona fide* holder of a bill of lading for value an absolute title to the goods described in it, and to protect that title from impairment by the assertion of any rights or equities of prior holders of, or parties to it, of which he had no notice. This view of the Maryland statute was taken by the Supreme Court of that State in the case of Tiedman *v.* Knox.[1] Although in that case the precise point raised in the case of Shaw *v.* The Railroad[2] was not presented, yet it was squarely decided that the Maryland statute has effected such a change in the law as to constitute a party receiving a bill of lading in payment of an antecedent debt a purchaser and *bona fide* holder thereof for value as effectually as though the instrument had been a bill of exchange or promissory note. The court adverted to the fact that in the case of the Baltimore and Ohio Railroad Company *v.* Wilkins,[3] decided before the passage of the statute, it was held that the law did *not* regard bills of landing as "negotiable in the same sense in which a bill of exchange and promissory note was," and the legislature then declared that they *shall* be so negotiable, using the very language of the prior decision. "This," said the court, "is a very different thing from merely prescribing that the manner of their negotiation shall be by indorsement and delivery," as was done by the statutes of Pennsylvania and Missouri.

§ 455. Where, as is frequently the case, bills of lading are issued in sets of three, it may happen that different parts of the same bill may be transferred to different parties who respectively make advances upon them in good faith. In such a case the property passes to the first transferree, unless a subsequent transferree has an equity superior to that of being, like the first, a *bona fide* transferree for value,[4] and the former is not under any obligation to do any further act to assert his title. These

[1] 53 Md. 612.

[2] 101 U. S. 557.

[3] 44 Md. 27.

[4] Meyerstein *v.* Barber, L. R. 4 H. L. 317; Fearon *v.* Bowers, 1 H. Bl. 364; 1 Sm. Ldg. Cases, p. 782; Kent's Comm., Vol. III. 308; Skilling *v.* Bollman, 6 Mo. App. 76; Weyland *v.* Atchison, etc., R. R. Co., 30 Am. & Eng. R. Cases, 102; s. c. 33 Northwest, 133.

rules were laid down in Meyerstein *v.* Barber.[1] In that case the bill was issued in triplicate and all of the copies came into the possession of the consignee. The latter obtained an advance upon the cargo from the plaintiff, transferring to him two of the bills as security therefor and fraudulently retaining the third. This he pledged to the defendant as security for another loan, the defendant having no knowledge of the first. The defendant having obtained the goods from the carrier under the third copy, the plaintiff brought his action, the declaration being for money had and received, with a count for wrongful conversion. He was held entitled to recover. "There can be no doubt," said Lord WESTBURY, "that the first person who for value gets the transfer of a bill of lading, though it be only one of a set of three bills, acquires the property and all subsequent dealings with the other two bills must in law be subordinate to that first one and for this reason, because the property is in the person who first gets a transfer of the bill of lading." In reply to the argument "that a frightful amount of fraud may be perpetrated if persons are allowed to deal in this way with bills of lading drawn in sets, if you allow efficacy to be given to the first assignment of one of these bills, to the detriment of persons who may take for value subsequent assignments of the others," the Lord Chancellor said: "All that we can say is, that such has been the law hitherto and that the consequences of the supposed evil, whatever they may be, have not been considered to be such as to counterbalance the great advantages and facilities afforded for the transfer of bills of lading.[2] There is no authority or reason for holding that the

[1] L. R., 4 H. L. 317.

[2] Earl Cairns remarked upon this point, in Glynn *v.* East and West India Dock Co., L. R., 7 App. 600: "The mercantile world may, if they think right, alter the practice of giving bills of lading in more parts than one. But even supposing that the bill of lading is in more parts than one, all that any person who advances money upon a bill of lading will have to do, if he sees, as he will see, upon the face of the bill of lading, that it has been signed in more parts than one, will be to require that all the parts be brought in, that is to say, that all the title deeds are brought in. I know that is the practice with regard to other title deeds, and it strikes me with some surprise that any one would advance money upon a bill of lading without taking that course of requiring the delivery up of all the parts. If the person advancing the money does not

person who first obtains the assignment of a bill of lading, and has given value for it, shall not acquire the legal ownership of the goods it represents. It seems to be required by the exigencies of mankind. It may be a satisfaction to be told by Mr. Justice WILLES (though it is a matter upon which I put no reliance), that other nations concur with us in holding that (whatever inconveniences there may be attending it) the person who gets the first assignment for value is the person to be preferred."

§ 456. In this decision it will be seen that the actual possession of the goods did not affect the question. The holder of the first transferred bill was held to be under no obligation to give immediate notice of his title to the carrier or his agent and was permitted to recover notwithstanding that the transferree of the second copy had obtained the goods. As in Meyerstein *v.* Barber,[1] however, it was held that although the goods had at the time of these transfers been actually landed at a wharf, the effect of the bills as documents of title had not been spent, since the goods having been stopped for freight, the "engagement of the ship-owner had not been completely fulfilled."[2] There is room for a query as to whether the rulings there made would be materially affected were such transfers made *after* the obligations of the shipowner had been completely fulfilled, and if the holder of the first transferred bill neglected under these circumstances to take possession until after it had been obtained by the subsequent transferree. In Meyerstein *v.* Barber, it was further intimated (though the point did not arise for decision) that a carrier or warehouseman who has no notice of the transfer of one of a set of bills is excused to the holder for delivering the goods to a party presenting another of the set which has in fact been subsequently taken; though this will not affect the

choose to do that, another course which he may take is, is to be vigilant and on the alert, and to take care that he is on the spot at the first arrival of the ship in the dock. If those who advance money on bills of lading do not adopt one or other of these courses, it appears to me that if they suffer, they suffer in consequence of their own act." But see remarks in Sanders *v.* McLean, 11 Q. B. Div. 327.

[1] L. R. 4 H. L. 317.

[2] Ib.

legal ownership of the goods as between the holders of the two bills.

§ 457. This question arose, however, in Glynn *v.* East and West India Dock Company,[1] and the rule propounded as a *dictum* in Meyerstein *v.* Barber, was there laid down as the *ratio decidendi.* In that case merchandise was consigned to C. & Co., of London, the ship-master signing three bills of lading marked respectively "First," "Second," and "Third," and each bearing the proviso, "the one of which bills being accomplished, the others to stand void." During the voyage C. & Co., pledged the bill marked "First" to a bank for a loan. Upon the arrival of the ship the goods were lodged with the defendant company, which was notified by the master to detain them until the freight should be paid. C. & Co. produced to the company the bill of lading marked "Second" unindorsed. The company entered C. & Co. upon their books as the proprietors of the goods and upon payment of the freight, delivered the latter to other parties upon orders signed by C. & Co. The dock company acted in good faith and without any knowledge of the bank's claim. It was held that the bank could not maintain any action against the dock company. Lord BLACKBURN said, "Where the person who produces a bill of lading is one who—either as being the person named in the bill of lading which is not indorsed, or as actually holding an indorsed bill—would be entitled to delivery under the contract, unless one of the other parts had been previously indorsed for value to some one else, and the master has no notice or knowledge of anything except that there are other parts of the bill of lading, and that, therefore, it is possible that one of them may have been previously indorsed, I think the master cannot be bound, at his peril, to ask for this other part."

§ 458. It should be noted, however, that in another part of the opinion his Lordship said, "Where the master has notice or probably some knowledge of the other indorsement I think he must deliver at his peril to the rightful owner or interplead." The two classes of cases are clearly distinguishable and Glynn *v.* The Dock Company[2] must not be taken as an authority for the existence of any right of choice in the carrier as between

[1] L. R., 7 App. 591. [2] Ib.

contestants for the cargo both of whom are known to him as such. The contrary doctrine was laid down in Fearon *v.* Bowers,[1] decided in 1753, where it was held (though delivery was made by the carrier to the party who would be actually entitled thereto under the rule of Meyerstein *v.* Barber,[2] viz., to the party first presenting his bill of lading rather than to a party presenting another bill subsequently, but before delivery to the first) that according to the usage of trade, the carrier is not bound to ascertain who has the best right on different bills of lading. This rule was adopted in a *dictum* in The Tigress,[3] but was not adopted in Glynn *v.* The Dock Company, where no occasion arose for its application. It has been considered in that case and elsewhere very doubtful law.[4]

§ 459. Notwithstanding the decision in Glynn *v.* East and West India Dock Company, that a carrier who has no notice of a superior right may deliver the goods to the party first presenting one of a set of bills, it was held in Sanders *v.* McLean[5] that a purchaser of goods to be paid for upon delivery of bills of lading, is bound to do so upon the tender of a duly indorsed bill, which is effective to pass the property, notwithstanding that the bill was drawn in triplicate and that all copies are not tendered or accounted for. Bowen, L. J., said: "If we were to hold that such a tender is not adequate, we must, as it appears to me, deal a fatal blow at this established custom of merchants, according to which, time out of mind, bills of lading are drawn in sets and one of the set is habitually dealt with as representing the cargo, independently of the rest. . . . . The only possible object of requiring the presentation of the third original must be to prevent the chance, more or less remote, of fraud on the part of the shipper or some previous owner of the goods. But this practice of merchants, it is superfluous to remark, is never based on the supposition of possible frauds. . . . . The vendor was not entitled to reject the tender of the only effective document on the bare chance that a third effective bill of lading might possibly have been dealt with, when in fact it had not. The person who rejects effective and adequate

[1] 1 H. Bl. 364.
[2] L. R. 4 H. L. 317.
[3] 32 L. J. Adm. 97.
[4] Glynn *v.* The Dock Co., p. 611.
[5] 11 Q. B. Div. 327.

documents of title on the bare chance that another document may possibly be outstanding, does so at his own risk. If his surmise turns out to be well founded, his rejection of the tender would be justified. But if it is a mere surmise, and has no foundation in fact, he has chosen by excess of caution to place himself in the wrong."

CHAPTER XXXIII.

THE BILL OF LADING IS A MUNIMENT OF NO TITLE AS AGAINST THE TRUE OWNER, WHEN THE PARTY ISSUING OR TRANSFERRING IT HAS NO TITLE OR AUTHORITY.

The general principle, §§ 460, 461, 462.
The question considered as one of bailment. The carrier may be compelled to disregard his bailor's title and recognize that of the true owner, § 464.
Want of notice to the carrier by the true owner does not validate the bill-holder's title, §§ 465, 466.
The manner in which the carrier's bailor obtained possession of the goods, whether fraudulently or in good faith, is immaterial, §§ 467, 468.
Unauthorized delivery by an agent confers no title, § 469.
Exception where an apparent ownership is intended, § 470.

§ 460. The language of many opinions, as has been already remarked, has been broader than is warranted by the decisions themselves and expressions, intended to convey no more than a statement of the transferability of the bill of lading, have been misconstrued as opinions that the instrument possesses all the incidents of commercial paper. The leading case of Lickbarrow *v.* Mason,[1] in which it was decided that a vendee who has acquired a good, though defeasible, title may, by his indorsement of the bill of lading to a *bona fidé* purchaser for value, confer upon the latter a title which is indefeasible, has been frequently invoked in attempts to confer upon a holder who has no title the power of transferring one by a transfer of the bill. No such power is attendant upon the negotiation of the instrument and nothing can be found in the leading case, or in those that follow, to establish it. The general rule that title cannot rise higher than its source, admits of no question. "No man can sell goods and convey a valid title to them, unless he be the owner, or lawfully represent the owner."[2] Although title to

[1] 2 T. R. 63; 1 H. Bl. 357; 6 East, 21.

[2] Benjamin on Sales, § 6; Saltus *v.* Everett, 20 Wend. 267; Howe *v.* Parker, 2 T. R. 376.

chattels is usually evinced by possession, possession does not create title nor enable one having possession to convey title. Certain exceptions to the general principle have been established in England, such as sales made in market *overt* and in cases governed by the Factors' Act and in both England and America in the case of bills of exchange and promissory notes, but the principle has not by any means been abandoned in its application to symbolical, as well as actual, possession, in other words, in its application to bills of lading. The doctrine of Lickbarrow *v.* Mason[1] constitutes, indeed, a most important modification of the main principle, but contains nothing at variance with it. The proposition there enunciated, that an unpaid vendor cannot exercise the right of stoppage *in transitu* against a *bona fide* indorsee for value of the bill of lading from the insolvent purchaser, is founded upon the fact that the latter has an actual title to the goods and although such a rule permits the ripening of a defeasible into an indefeasible title to the prejudice of the vendor, it nevertheless contains no warrant for disregarding the distinction between the transfer of a defeasible title and an attempt to transfer a title which has no existence.

§ 461. It may be regarded as settled that a bill of lading cannot, generally speaking, represent the goods which it purports to represent unless it has been issued to their true owner.[2] Were it otherwise a carrier would possess the absolute power to change at his own discretion the title to merchandise intrusted to him for transportation, by delivering a bill of lading therefor to any person who had managed to secure an apparent right of ownership or disposal. There may, as was observed in the case of Blossom *v.* Champion,[3] be cases in which some act or misconduct on the part of the true owner would estop

[1] 2 T. R. 63; 1 H. Bl. 357; 6 East, 21.

[2] The Idaho, 3 Otto, 575; Blossom *v.* Champion, 37 Barb. 554; Dows *v.* Perriss, 16 N. Y. 325; Moore *v.* Robinson, 62 Ala. 537; Saltus *v.* Everett, 20 Wend. 267; Traders' Bank *v.* Farmers and Mechanics' Bank, 60 N. Y. 40; Richardson *v.* Smith, 33 Ga. Suppl. 95; Union Transportation Co. *v.* Yeager, 34 Ind. 1; Farmers and Mechanics' Bank *v.* Erie Rwy. Co., 72 N. Y. 188; Benjamin *v.* Levy, 39 Minn. 11; Young *v.* East Ala. R. Co., 80 Ala. 100.

[3] 37 Barb. 554.

him from asserting his title against a holder of the bill of lading, but the general rule is undoubted. Its operation extends to a subsequent purchase of such a bill of lading in good faith and for a valuable consideration. Here lies the widest divergence between bills of lading on the one hand and bills of exchange and promissory notes on the other. Here appears most clearly the substantial distinction which must be observed in applying the word "negotiable" to the two classes of instruments.

§ 462. In the case of Craven *v.* Ryder[1] the plaintiffs contracted to sell certain goods to B. French & Co. and sent the goods by their lighterman to be laden upon a vessel of which the defendant was master, with an order to receive them for and on account of them, the plaintiffs. Upon the completion of the loading the mate in command gave an acknowledgment that the goods were received on board the ship for Hamburgh "for and on account of" the plaintiffs, it being the custom to give such a receipt pending the issuance of the final bill of lading. B. French & Co. contracted for the resale of the goods to Caldas and received from him the price. Caldas resold them to Bene to whom he consigned them, receiving the latter's acceptances on the credit of the consignment. The defendant, without the plaintiffs' knowledge or consent, issued a bill of lading to Caldas as the shipper of the goods deliverable to Bene or order at Hamburgh. B. French & Co. having stopped payment before paying the plaintiffs, the latter attempted to reclaim the goods from the defendant. They were held entitled to do so. Their right was in this case strengthened by the fact that, in accordance with the custom of the port, it was the duty of the defendant to issue no bill of lading except to the party presenting and surrendering the lighterman's receipt,—the plaintiffs thereby retaining a control over the goods at the time of the issuance of the bill to Caldas. The rule contended for by counsel however upon the authority of Lickbarrow *v.* Mason,[2] that there is no case in which the right of stoppage may be exercised after a resale of goods and payment of the price, or advancement of other consideration upon the credit of the goods by a second vendee, was clearly rejected.

[1] 6 Taunt. 433.

[2] 2 T. R. 63; 1 H. Bl. 357; 6 East, 21.

§ 463. So, in Blossom *v.* Champion,[1] the plaintiffs sold goods to B., to be paid for in cash on delivery and B. sold the same to W. The plaintiffs by order of B. caused the goods to be shipped on board a vessel of which the defendant, C., was master, taking receipts therefor, which they continued to hold. W., without having paid for the property and without any *indicia* of ownership save the fact that he had made an agreement for freight in the ship by which it was to carry for him a certain quantity of the kind of goods actually shipped, procured from the agent of the ship a bill of lading of the goods and indorsed the same to parties making advances upon it. It was proved that a custom had long prevailed at the port of shipment to deliver bills of lading only to the party holding the receipt of the master or agent of the vessel. The plaintiffs were held entitled to recover the property in an action against C. and W.,—the owners of the vessel having no authority to deliver a bill of lading to a party not having the evidences upon which bills of lading were customarily delivered.

§ 464. Another aspect of the case is presented when the relations between the carrier and the shipper are considered. It is most forcibly presented when a bill of lading is issued, not to one deriving his apparent title from the actual shipper or supposed by the carrier to possess a title so derived, but to an actual shipper who afterwards is discovered to have had no title. In either case, however, the question arises whether a common carrier may be compelled by the true owner of the goods carried, or by his assignee or indorsee, to disregard the bill of lading which he has issued to the shipper; whether, in other words, a bailee is not estopped from denying the title of the party who entrusted him with the goods. Upon this point the Supreme Court of the United States passed in the following language:[2] "In Rolle's Abr. 606, tit. 'Detinue,' it is said, 'If the bailee of goods deliver them to him who has the right to them, he is notwithstanding chargeable to the bailor who in truth has no right;' and for this 9 Hen. VI. 58, is cited. And so, if the bailee deliver them to the bailor in such a case, he is said not to be chargeable to the true owner (ib. 607), for which

[1] 37 Barb. 554.

[2] The Idaho, 3 Otto, 575.

7 Hen. VI. 22, is cited. The reasons given for such a doctrine, however satisfactory they may have been when they were announced, can hardly command assent now. It is now everywhere held that when the true owner has by legal proceedings compelled a delivery to himself of the goods bailed, such delivery is a complete justification for non-delivery according to the directions of the bailor. Bliden *v.* Hudson River Railroad Co., 36 N. Y. 403. And so when the bailee has actually delivered the property to the true owner, having a right to the possession, on his demand, it is a sufficient defence against the claim of the bailor. The decisions are numerous to this effect. King *v.* Richards, 6 Whart. 418; Bates *v.* Stanton, 1 Duer, 79; Hardman *v.* Willcock, 9 Bing. 382; Biddle *v.* Bond, 6 Best & S. 225. If it be said that by accepting the bailment the bailee has estopped himself from questioning the right of his bailor, it may be remarked in answer that this is assuming what cannot be conceded. Undoubtedly the contract raises a strong presumption that the bailor is entitled; but it is not true that thereby the bailee conclusively admits the right of the principal. His contract is to do with the property committed to him what his principal has directed—to restore it or to account for it. Chelseman *v.* Exall, 6 Exch. 341. And he does account for it when he has yielded it to the claim of one who has right paramount to that of his bailor. If there be any estoppel, it ceases when the bailment on which it is founded is determined by what is equivalent to an eviction by title paramount, that is, by the reclamation of possession by the true owner."

§ 465. Where the shippers of goods sell them conditionally while lying in a vessel awaiting the commencement of transportation, the fact that they did not give the carrier any notice of the conditional character of the sale, does not warrant the carrier in issuing a bill of lading to one whom he merely understands to be the duly entitled vendee or to one claiming under the latter; nor does it give any validity to the bill as against the right of the true owner.[1] In most ports the custom is well established—and it is believed to be universal—for the carrier to issue the bill of lading only upon the surrender of

[1] Brown *v.* Peabody, 13 N. Y. 121; Blossom *v.* Champion, 37 Barb. 554.

the lighterman's receipt, which is always retained by the shipper in the meanwhile until the transportation is about to commence, or until he has sold the goods and is ready to deliver symbolical possession. This custom has become so thoroughly settled and so well understood as to rise to the dignity of a legally binding mercantile law.[1] Of it the carrier is bound to have cognizance and a shipper is no more bound to notify him not to transgress it than to warn him against the breach of any other law. It would seem that the same rule should hold in inland transportation and that it is the duty of the railway company or other carrier to deliver a bill of lading only upon the production of the "dray receipt." It follows, therefore, that the holder of a bill of lading which has been issued to one not the true owner of the goods has no stronger title under the bill by reason of the fact that the true owner failed to notify the carrier not to issue it.

§ 466. The same rule as to notice, of course, holds where the true owner of the goods holds bills of lading as his muniment of title to them. Where, as is frequently the case, the bill is issued in sets of three and different parts come into the hands of different parties, he who by virtue of being the first transferree in good faith and for value is the preferred claimant, is under no obligation to give notice of his title and the holder of that copy of the bill which was transferred by one without title or authority obtains no title which can be maintained against that of the true owner.[2]

§ 467. The consideration of the question under discussion is not affected by the manner in which the bailor obtained possession. It has sometimes been argued that the carrier is

[1] Blossom *v.* Champion, 37 Barb. 554; Craven *v.* Ryder, 6 Taunt. 433; Brower *v.* Peabody, 13 N. Y. 121; Schuster *v.* McKellar, 26 L. J. Q. B. 281; Thompson *v.* Trail, 2 Car. & P. 334; Ruck *v.* Hatfield, 5 B. & Ald. 632.

It is to be noted, however, that these lightermen's receipts are not of such a character that their production in itself warrants the carrier's issuing of a bill of lading. They are no more negotiable than the bill of lading itself. If the carrier issue a bill of lading to a thief who presents the lighterman's receipt, he remains liable to the true owner. Brower *v.* Peabody, 13 N. Y. 121.

[2] Meyerstein *v.* Barber, L. R. 4 H. L. 317; Glynn *v.* East and West India Dock Co., L. R. 7 App. 605; Skilling *v.* Bollman, 73 Mo. 665.

entitled to interpose the *jus tertii* as an excuse for failing to deliver the goods, only when he has been compelled by legal proceedings to deliver them otherwise or when his shipper obtained the goods by fraud. That the rule which estops him from denying the right of his bailor cannot be invoked where the latter's possession of the bill has been obtained feloniously, admits of little discussion.[1] To establish the contrary rule would be to place a premium upon theft. In cases of fraud the rule is equally clear.[2] In Moore *v.* Robinson,[3] the plaintiff below, Robinson, the true owner of a quantity of cotton, gave to one Carter authority to ship the cotton in his, the plaintiff's, name to the defendants below, Moore & Co., giving him, however, no authority to make the shipment in his own name. This, however, Carter did, obtaining from the railroad company by which he shipped the goods a bill of lading, upon which he obtained advances from Moore & Co., which he appropriated to himself. Robinson brought suit against Moore & Co. for the value of the cotton and it being clear that Carter had fraudulently assumed an ownership which the plaintiff and not he possessed, the court held the plaintiff entitled to recover. So in Saltus *v.* Everett,[4] where the master of a vessel in which the goods were originally shipped had fraudulently, at an intermediate port, transshipped the goods into another vessel, from the captain of which he obtained a bill of lading in his own name, it was held that a purchaser of a part of the cargo under such bill of lading, though a purchaser for value and in good faith, obtained no title to the goods.

§ 468. Not only in cases of fraud, but also in cases where the shipper actually supposes himself to be the possessor of rights to the property, the rule will be enforced which protects a true owner. "The modern and best considered cases treat as a matter of no importance the question how the bailor acquired the possession he has delivered to his bailee and adjudge that if the bailee has delivered the property to one

[1] Brower *v.* Peabody, 13 N. Y. 121.

[2] Moore *v.* Robinson, 62 Ala. 537; Saltus *v.* Everett, 20 Wend. 267; Richardson *v.* Smith, 33 Ga. (Supplement), 95.

[3] 62 Ala. 537.

[4] 20 Wend. 267.

who had the right to it as the true owner, he may defend himself against any claim of his principal."[1]

In Biddle *v.* Bond,[2] the Queen's Bench decided that the position of the bailee is precisely the same, whether his bailor was honestly mistaken as to the rights of the third person or fraudulently acting in derogation of them. This case is quoted with entire approval and followed by the Supreme Court of the United States in The Idaho[3] and by the New York Court of Appeals in the Western Transportation Company *v.* Barber.[4]

§ 469. In accordance with the same principle, it has been held that a special agent authorized to deliver a bill of lading only upon the payment of a bill of exchange drawn against the goods and attached to the bill of lading, cannot bind his principal by a delivery of the bill made without such payment. A party obtaining possession of the bill with the assent of such agent, but without the assent of the principal, acquires no title to the goods as against the latter.[5]

§ 470. The cases under consideration will of course be distinguished from those in which an owner may have deliberately caused a bill of lading to be made out in the name of another for the very purpose of clothing the latter with an apparent ownership. In such a case a *bona fide* purchaser will undoubtedly be protected,—the principle of estoppel prohibiting the true owner from advancing an adverse claim.[6]

[1] The Idaho, 3 Otto, 575.
[2] 6 Best & S. 224.
[3] The Idaho, 3 Otto, 575.
[4] 11 Sickels, 544.
[5] Stollenwerck *v.* Thacher, 115 Mass. 224.
[6] Saltus *v.* Everett, 20 Wend. 267; Pickering *v.* Buck, 15 East, 44.

CHAPTER XXXIV.

THE BILL OF LADING AS A MUNIMENT OR AS EVIDENCE OF TITLE IN A CONSIGNEE.

The bill is *prima facie* evidence of the consignee's title, §§ 471, 472, 473, 474.
The consignee is *prima facie* the owner, although the carrier be paid by the consignor, § 475.
The consignor's property is sufficient to enable him to maintain an action for a failure or refusal to deliver the goods, § 476.
The consignee may sue without delivery of the bill, when the consignor releases his title, § 477.
Or upon the re-indorsement of the bill, § 478.
The consignment is not conclusive evidence of a title in the consignee, §§ 479, 480, 481.
Making goods deliverable to the vendor's order is *prima facie* evidence of intention to reserve the *jus disponendi*, §§ 482, 483.
Making goods deliverable to the vendor's agent has the same effect, § 484.
The presumption is strengthened when the bill is pledged to secure a draft drawn against the goods, but it is not thus made conclusive, §§ 485, 486.
Shipment in the vendee's vessel does not conclusively rebut the presumption of reserved control, §§ 487, 488.
The reservation of the *jus disponendi* is a question of intention, §§ 489, 490.
Where the consignee is the consignor's factor, §§ 491, 492.

§ 471. THE effect of a consignment of goods generally is to vest the property in the consignee. Where goods are consigned without reservation on the part of the consignor, the *prima facie* legal presumption is that the consignee is the owner.[1] In other words, the ordinary effect of a bill of lading is to vest in the consignee the legal title to the goods shipped. Without quali-

[1] Congar *v.* Chicago and Galena Union R. Co., 17 Wis. 477; Griffith *v.* Ingledew, 6 S. & R. (Pa.) 429; McCauley *v.* Davidson, 13 Minn. 162; Everett *v.* Saltus, 15 Wend. 474; Arbuckle *v.* Thompson, 1 Wright, 170; Lawrence *v.* Minturn, 17 How. 100; Grove *v.* Brien, 8 ib. 439; Krulder *v.* Ellison, 47 N. Y. 36; The Mary and Susan, 1 Wheat. 25; Watkins *v.* Paine, 57 Ga. 50; Merchants' Dispatch Co. *v.* Smith, 76 Ill. 542; Wolf *v.* Dietzsch, 75 ib. 205; Sedgwick *v.* Cottingham, 54 Iowa, 512; Torrey *v.* Corliss, 33 Me. 333; Arnold *v.* Prout, 51 N. H. 587; Walker *v.* The State, 9 Tex. App. 39; Schlessinger *v.* Stratton, 9 R. I. 578.

fying terms, it is *prima facie* evidence that the specified property belongs to the consignee.

§ 472. The language of many of the decisions, in stating this general rule, has been broad but an examination will show that the principle really intended to be enunciated is not by any means that the insertion of a party's name in the bill as consignee constitutes an irrevocable transfer of title to him, even when the goods are delivered to the carrier and the bill to the consignee, but that when there is no proof as to the ownership of the property, the consignee is presumed to be the owner and is the proper party to sue for any injury to or detention or misappropriation of it. The consignment and delivery is *prima facie* evidence of the sale of the goods to the consignee. With this qualification, however, it may be safely asserted as a general rule, that when the goods are delivered to the carrier and the bill is sent to the consignee, the title to the goods is passed to the latter for every purpose, except of defeating the vendor's right of stoppage *in transitu*, or his right to insist upon the consignee's performance of conditions on which express contract or legal implication has made the delivery dependent. In such a case, were a loss to occur in the transportation of the goods, it would fall upon the consignee,—the property in them having vested in him immediately upon their delivery to the carrier.[1] Where, therefore, there is no stoppage *in transitu*, the general rule is that the shipper, by delivery to the carrier, divests himself of all control of the goods.[2] Where, for instance, goods are consigned "for account and risk of" the con-

[1] Rogers *v.* Great Western Ry. Co., 16 Up. Can. Q. B. 389; Graff *v.* Foster, 67 Mo. 512; Armentrout *v.* St. L., K. C. & N. R. Co., 1 Mo. App. 158; Wilcox Silver Plate Co. *v.* Green, 72 N. Y. 20; Caulkins *v.* Hellman, 47 ib. 449; Cross *v.* O'Donnell, 44 ib. 661; Hunter *v.* Wright, 12 Allen, 548; Magruder *v.* Gage, 33 Md. 344; Frank *v.* Hoey, 128 Mass. 263; Waldron *v.* Romaine, 22 N. Y. 368; Fenton *v.* Braden, 2 Cranch C. C. 550; Jones *v.* Sims, 6 Porter (Ala.) 138; Ochs *v.* Price, 6 Heiskell, 483; Hobart *v.* Littlefield, 13 R. I. 341; Walley *v.* Montgomery, 3 East, 585; Johnson *v.* Dodgson, 2 M. & W. 653; Norman *v.* Phillips, 14 ib. 277; Smith *v.* Hudson, 34 L. J. Q. B. 145; Haille *v.* Smith, 1 B. & P. 563.

[2] Walley *v.* Montgomery, 3 East, 585; Blum *v.* The Caddo, 1 Woods, 64, and authorities in note, *supra*.

signee, it being stipulated by the consignor that the latter shall pay the freight and shall pay for the goods by accepting drafts at three months, if the consignor's agent obtain possession of the goods under a second bill of lading and refuse to deliver them, notwithstanding the consignee's tender of his acceptances, the consignee may maintain them against the agent.[1]

§ 473. In Schmertz *v.* Dwyer,[2] a merchant in Brazil ordered goods of a Pittsburgh firm, with instructions to send them to Brazil at the first opportunity. The goods were shipped from Pittsburgh to New York, with instructions to the forwarding merchants at New York to ship them to Brazil. No vessel being found for some months, the vendors finally ordered the sale of the goods and received the proceeds,—the goods having greatly enhanced in value. The vendee sued for damages. The court held him entitled to recover,—the consignment of the goods and the forwarding of the bill to him having fully vested the title in him.

In Grove *v.* Brien,[3] the defendant shipped a quantity of nails to Fowle & Sons, for the purpose of securing his indebtedness to one Gilmor and took from the carrier a bill of lading making the nails deliverable to Fowle & Sons "for the use of Robert Gilmor." It was held that the goods were not subject to attachment by Grove, a creditor of Brien and that Fowle & Sons had no valid lien upon them for advances previously made to Brien. The consignment being virtually in the name of Gilmor, the title passed to him.

§ 474. In Bailey *v.* Hudson River Railroad Company[4] the plaintiffs received an invoice from a firm to which they had made an advance upon the goods. The latter were by agreement consigned to pay this advance and also a specific debt of the consignors and under such consignment were delivered to the defendant to be transported to the plaintiffs. Instead of delivering the goods in accordance with the consignment, the defendant at the request of a member of the consignor firm changed the destination of the goods and delivered them to another party, who sold them and appropriated the proceeds.

[1] Walley *v.* Montgomery, 3 East, 585.

[2] 53 Pa. St. 335.

[3] 8 How. 429.

[4] 49 N. Y. 70.

In this case the consignors made no attempt to negotiate the bill of lading and the defendants were held liable to the plaintiffs for a conversion of the goods. The court said: "If A. has property upon which he has received advances from B. under an agreement that he will ship it to B. to be sold to pay the advances, or to pay any indebtedness; he may or may not comply with this contract [in the latter case of course incurring liability for the breach]. He may ship to C., or to B. upon conditions, but if he ships to B. in pursuance of his contract, the title vests in B. upon the shipment. The highest evidence that he has so shipped is the consignment and unconditional delivery to B. of the bill of lading; but if A. retains the bill of lading and notifies B. by letter that he has shipped the property for him in pursuance of the agreement, or in any other manner the intent to ship is thus evinced, the title passes as effectually, as between them, as if the bill of lading had been delivered." The court held that the intention of the consignors to vest the property in the plaintiffs indisputably appeared by the agreement prior to the shipment, by the forwarding of invoices to the plaintiffs, by the fact that the shipment was unconditional and by the consignors' retention of the bill of lading without making or attempting to make any use of it.

§ 475. The rule that, where there is no evidence to the contrary, the law will imply ownership in the consignee and vest in him a right to bring suit against the carrier for any breach of the latter's duty in respect of the goods, holds even though the consignor has paid the carrier for the transportation of the goods. In Griffith *v.* Ingledew[1] the court said: "It is objected that there is no privity of contract between the shipper and the consignee, and that in the present instance, the freight being paid by the shipper, there is a want of consideration to support a promise to the consignee. It is unnecessary to decide whether the shipowner could have supported an action for the freight against the plaintiff, or whether the shipper, who paid the freight, might have maintained an action in his own name for the negligent carriage of the goods. The question is

[1] 6 S. & R. (Pa.) 428.

whether the consignee may not support an action. And for the purpose of this argument it is to be assumed that the consignee is the owner of the goods, without taking the equitable title into consideration. It is nothing to the defendant who is entitled in equity, since no conflicting equitable claim has been brought forward; but this action is in truth for the benefit of the equitable owner. . . . . A promise in law may be said to have been made to the plaintiff that the goods would be carried safely. Indeed it might almost be said that a promise *in fact* was made to the plaintiff for the bill of lading does not expressly make a promise to anybody. It runs thus: 'Shipped by A. T. Patterson, to be delivered to Robert E. Griffith or his assigns, at Philadelphia.' It would be doing no violence to the instrument to construe it as a promise made to the plaintiff."

§ 476. In accordance with the foregoing principles, it has been held that the consignee of goods delivered to a common carrier for transportation has such property therein as to enable him to maintain an action for a failure to transport or deliver them. The bill of lading or receipt of the carrier is sufficient to establish such a *prima facie* case of ownership as will enable a party holding it to sustain an action for a breach of the contract on the part of the carrier.[1]

In Arbuckle *v.* Thompson,[2] the court said: "The defendants asked the court to instruct the jury that the plaintiff had not shown property in himself so as to enable him to maintain his action. The furniture, for the non-delivery of which suit was brought, was shipped in New York, marked O. Colburn, Meadville, Pennsylvania, care Thompson & Arbuckle, Erie, Penna. Thompson & Arbuckle were forwarding and commission merchants at Erie and common carriers between Erie and Meadville. Now, that a consignee of goods delivered to a common carrier for transportation may maintain an action for failure to transport or deliver them, seems hardly to admit of doubt. The

[1] Arbuckle *v.* Thompson, 1 Wright, 170; Fowler *v.* Cooper, 3 La. 215; Madison, etc., R. Co. *v.* Whitesel, 11 Ind. 55; Vallé *v.* Cerré, 36 Mo. 575; Butler *v.* Smith, 6 George, 457; Griffith *v.* Ingledew, 6 S. & R. 428.

[2] 1 Wright, 170. The name of this case is an error; it should be Colburn *v.* Arbuckle & Thompson.

doubt has rather been whether the action could be maintained in the name of the consignor. And though it has been ruled that it may be, where the property in the goods is proved to have remained in the consignor, yet this is not at all in conflict with the right of the consignee to sue where there is no such proof of ownership. Here there was no other evidence of ownership than what was furnished in the bill of lading or receipt of the carrier, and these established a *prima facie* case of ownership in the plaintiff sufficient to enable him to maintain the action."

The rule of course does not apply where, by virtue of a contract between the vendor and his consignee, the goods did not become by the consignment the property of the consignee and he was not at any risk in regard to them until they actually reached him. In such a case the consignor should be the plaintiff in any action against the carrier.

§ 477. While, in general, delivery of a bill of lading to the consignee, or delivery and acceptance of the goods, is necessary to convey to him such a title as will enable him to sue the carrier, yet the same result may be obtained without such delivery by the consignor's release of his title or claim to the consignee, with the latter's assent, after the cause of action has arisen.[1] Where the property lost is a package of money, the consignee, after such release, may maintain an action for money had and received.[2]

§ 478. Where the consignee has parted with his bill of lading, as by indorsing it to one making an advance upon it, its reindorsement to him upon his repayment of the advance will reinvest him with his right under the original contract to bring suit against the carrier for a wrongful delivery.[3]

§ 479. The mere appearance of a particular party's name however in a bill of lading cannot, of course, confer upon such a party an absolute title to the goods. It may confer no title at all. The mere signing and delivery by the carrier of a bill of lading does not in itself pass title in the goods to the consignee.[4] The consignment is not a creation of absolute

[1] Ela *v.* Express Co., 29 Wis. 611.

[2] Ib.

[3] Short *v.* Simpson, L. R. 1 C. P. 248.

[4] Mitchell *v.* Ede, 11 Ad. & Ell. 888; Conrad *v.* Atlantic Ins. Co., 1 Peters, 444; Allen *v.* Williams, 12 Pick. 297; Pratt *v.* Parkman, 24

title in him. Though by the execution and delivery of the bill of lading the consignee obtains a contingent or qualified interest in the shipment which neither the carrier nor the shipper, except under certain circumstances, can divest, yet, as a rule, the consignee's title is not complete until the bill of lading comes into his hands.[1] Where the consignment is attended by other circumstances, which in connection with it clearly evince an intention to pass the title, the fact that the consignee has not received the bill of lading cannot, of course, defeat his title, or confer title upon one in whose favor the consignor, subsequently to its original delivery, alters it.[2] The title of the consignee in such a case however exists not by virtue of the bare consignment, but by virtue of other elements of the case constituting a complete delivery.

§ 480. Before the consignment can in any event be regarded as vesting title in the consignee, it must be accepted by the latter. Where he has not accepted it and disclaims any interest in it, the court will hold the title to be revested in the consignor.[3] In accordance with the same principle, where the bill is indorsed in blank and sent to the consignee with authority to fill up the blank, the consignment can vest property in no one until the blank is filled.[4] Where a shipment is to be sold on joint account of the consignee and shipper, or of the former alone at his option, the property does not vest in the consignee until he so elects under his option.[5] If the consignment be rejected, the consignee has no interest thereunder which will enable him to maintain a subsequently acquired possession of

ib. 42; Bank of Rochester *v.* Jones, 4 N. Y. 497; First Nat. Bk. of Cairo *v.* Crocker, 111 Mass. 163; Taylor *v.* Turner, 87 Ill. 296; Hall *v.* Ship Chieftain, 9 La. 318; Hepburn *v.* Lee, 14 ib. 76.

[1] Bruce *v.* Andrews, 36 Mo. 593; Hausman *v.* Nye, 62 Ind. 485; Woodruff *v.* Nashville, etc., Co., 2 Head (Tenn.), 87; Saunders *v.* Bartlett, 12 Heiskill (Tenn.), 316; Oliver *v.* Moore, ib. 482.

[2] Summerill *v.* Elder, 1 Binney (Pa.), 106.

[3] Ezell *v.* English, 6 Porter (Ala.), 311; Chopin *v.* Clark, 31 La. Ann. Rep. 846; Ela *v.* Express Co., 29 Wis. 611; Woolsey *v.* Cenas, 1 Martini (La.), 26; Audenried *v.* Randall, 3 Cliff. 99; Peck *v.* Ritchey, 66 Mo. 114.

[4] Chandler *v.* Sprague, 46 Mass. 306.

[5] The Venus, 8 Cranch, 253.

the goods.[1] So where a conditional shipment is made; *e. g.*, where the property is to pass upon the consignee's acceptance or payment of a draft, the consignee has no title until the condition is performed.

§ 481. As between the shipper and the carrier, there is nothing final or irrevocable in that part of the bill which designates the destination of the goods and the former may change the destination at any time before the bill of lading or the goods themselves are delivered to the consignee. As between the shipper and the consignee, that part of the bill which designates the party to whom the goods are to be delivered is *prima facie* evidence of an intention to confer title upon the latter, but the mere filling of the bill with his name cannot necessarily constitute him the vendee. The consignment is not an invariable equivalent of delivery. Whether or not it was intended to operate as such is a question of intention and that intention must be deduced from a consideration of all the circumstances of each case. No general rule can be laid down by which the question can in all cases be determined. The leading approximate rules of construction which are warranted by the cases are set forth in the following sections.

§ 482. It is strong *prima facie* evidence of the vendor's intention to reserve to himself the *jus disponendi* and prevent title to the goods shipped from passing to the vendee, that the bill of lading is made deliverable to the order of the vendor.[2] Thus in Ellershaw *v.* Magniac,[3] the plaintiff, a merchant at Leeds, contracted with a firm carrying on business at London and Odessa, for the purchase of a quantity of linseed and the Odessa partner drew upon the plaintiff bills of exchange for the price. A vessel chartered by the plaintiff proceeded to Odessa to take the linseed on board. The Odessa partner wrote to the London partner, "With regard to your sales of linseed, Mr.

[1] Brandt *v.* Bowlby, 2 B. & Ad. 932.

[2] Mason *v.* Great Western R. R. Co., 31 Up. Can. Q. B. 73; Alderman *v.* Eastern R. R. Co., 115 Mass. 233; Stollenwerck *v.* Thacher, ib. 224; Security Bank *v.* Luttgen, 29 Minn. 363; Peoples' Nat. Bank *v.* Stewart, 3 Pugs. & Bur. (New Brunswick), 268; Jenkyns *v.* Brown, 14 Q. B. 496.

[3] 6 Ex. 569.

Ellershaw [the plaintiff] will receive a part by The Woodhouse" [the vessel chartered by the plaintiff]. A portion of the linseed was shipped by the vessel and the Odessa partner obtained from the master a bill of lading making it deliverable "unto order or assigns." The Odessa partner, being in difficulties, indorsed the bill of lading for value to a third party. The court held that there was no such delivery of the goods as to vest the right of possession or property in the plaintiff, the circumstance of the shippers making the linseed deliverable to order by the bill of lading clearly showing the intention to preserve the right of property and possession in themselves until they had made an assignment of the bill to some other party. The original intention of delivering the goods to Ellershaw was thus not exercised.

§ 483. In Ogg *v.* Shuter,[1] the plaintiffs had entered into a contract with a French merchant for the purchase of twenty tons of potatoes at a certain price, deliverable in the course of the current month free on board of a ship at Dunkirk, payment to be by cash against a bill of lading, a part payment of £30 to be made in earnest of the bargain. The part payment was made and the potatoes shipped at Dunkirk by the vendor's agent and in sacks sent over for the purpose by the plaintiffs. The bill of lading made the goods deliverable to the vendors' order. The defendant, an agent of the vendor to whom the bill of lading had been indorsed, presented to the plaintiffs, upon the cargo's arrival in London, the vendor's draft for acceptance with the bill of lading indorsed by the defendant, annexed to it. The plaintiffs supposing that the shipment was short, refused to accept, but wrote to the defendant giving him notice that the potatoes were their property and that if he parted with them to anybody else, he would be held responsible. The defendant afterwards sold the goods. The court of common pleas held that the contract to deliver "free on board," the part payment of the price and the shipping of the potatoes in the plaintiffs' own sacks over-balanced the presumption of the vendor's reservation of the *jus disponendi* arising from the expression "cash against bill of lading" and the drawing of the

[1] L. R. 1 C. P. Div. 47.

bill to the vendor's order. Judgment was given for the plaintiff. This was reversed by the Court of Appeal, the court saying, "We think this much is clear, that where the shipper takes and keeps in his own or his agent's hands a bill of lading, in this form to protect himself, this is effectual so far as to preserve to him a hold over the goods until the bill of lading is handed over on the conditions being fulfilled, or at least until the consignee is ready and willing and offers to fulfil these conditions and demands the bill of lading."

The court held that the taking and holding of a bill drawn in such form constitutes not merely a reservation of the vendor's lien, but reserves a right of disposing of the goods so long at least as the vendee continues in default.

§ 484. The same construction applies where the goods are made deliverable to an agent of the consignor.[1] Thus, in The St. Jose Indiano[2] the vessel was captured and most of the cargo condemned as the property of an enemy. Lizaur, of Rio Janiero, to which port the vessel was bound when captured, claimed restitution. The captors, however, claimed that the property was at the risk of the shipper, D. B. & Co., who were enemies. Although the bill of lading did not specify to whose order the property was deliverable, the invoice was headed "consigned to Messrs. D. B. & F., by order and for account of J. Lizaur." In a letter accompanying the invoice and bill of lading the consignors wrote: "For Mr. Lizaur, we open an account, etc. We cannot yet ascertain the proceeds of his hides, etc., but find his order for goods will exceed the amount of these shipments; therefore we consign the whole to you, that you may come to a proper understanding with him." The court held that Lizaur had no claim, the delivery to the master being not for his use, but for the consignee, a house composed of the same persons as the shippers and acting as their agents. "It is apparent from the letter that the shippers meant to reserve to themselves and to their agents, in relation to the shipment, all those powers which ownership gives over property."[3]

[1] Dows *v.* Nat. Exchange Bank, 1 Otto, 618; The St. Jose Indiano, 1 Wheat. 208.

[2] 1 Ib.

[3] "In general the rules of the prize court as to the vesting of property are

§ 485. Where a bill of lading drawn to the order of the consignor is assigned to one who discounts a draft drawn against the goods, the presumption drawn from the form of the instrument may be regarded as well-nigh strengthened to conclusiveness. Such a transaction clearly implies an intention on the part of the consignor that no title to the goods shall pass to the vendee until he has accepted, or paid, the draft drawn against him for their price.[1] Title does not vest in the consignee in such a case until he has complied with the condition. The mere fact however that the bill of lading, with a blank indorsement, is attached to a sight draft and sent by the vendors to a bank as their agent to collect the one and deliver the other, does not constitute in itself a conclusive presumption that the vendors intended to thereby retain title in themselves. Where the other circumstances of the case and the previous course of dealing between the parties indicate an intention to pass the title, such a retention of the bill will be held to be a retention of possession by the vendor merely as the vendee's bailee or agent,—the goods being during such agency at the vendee's risk.[2] It is important to notice that, if it is the intention of the consignor that title shall pass only upon the consignee's acceptance or payment of drafts drawn against the goods, such intention must be manifested by the form of the bill and by the consignor's retention of its possession through his agent. Although it may be the shipper's expectation and intention that the goods shall be specifically appropriated to take up bills drawn by him against the consignee the proceeds of which have been used for the purchase of the goods, the property will nevertheless vest absolutely in the consignee if the shipper mails to the latter a bill of lading of the goods deliverable to the consignee's order. Thus in *Ex parte* Bonmar,[3] Christiansen

the same with those of the common law," ib. 212.

[1] Dows *v.* National Exchange Bank, 1 Otto, 618; Alderman *v.* Eastern R. Co. 110 Mass. 233; Stollenwerck *v.* Thacher, ib. 224; Security Bank *v.* Suttgen, 29 Minn. 363; Jenkyns *v.* Brown, 14 Q. B. 496; Mason *v.* Great Western R. Co., 31 Up. Can. Q. B. 73; People's Nat. Bank *v.* Stewart, 3 P. & B. (New Brunswick) 268.

[2] Hobart *v.* Littlefield, 13 R. I. 341. In this case the form of the bill of lading does not appear.

[3] L. R. 2 Ch. 278.

& Co., commission merchants in South America for Tappenbeck & Co. of England, drew bills of exchange upon the latter, which they had discounted in Para and with the proceeds of which they purchased goods for shipment to Tappenbeck & Co. They shipped the goods and sent bills of lading therefor, making the goods deliverable to Tappenbeck & Co., together with invoices, direct by post to the latter firm, advising them at the same time of the drawing of the drafts and requesting them to carry the price of the goods to their account. While a cargo of goods shipped under this arrangement was in transit both firms stopped payment. The liquidating trustee of the English firm took possession of the cargo upon its arrival. The creditors of the South American firm claimed to have it appropriated to meet the bills drawn against it, some of which at the time when Tappenbeck & Co. stopped payment had been accepted but not paid and some not accepted. The court held, however, that Christiansen & Co., whether regarded as the agents of the English firm or as vendors, had parted with all the property in the goods and had no power to direct appropriation of the proceeds. As soon as the goods were put on board ship at Para and the bills of lading making the goods deliverable to the consignees were put in the post directed to the consignees, the goods were placed thereby beyond the control of Christiansen & Co. and the property in them passed to Tappenbeck & Co. "We conceive it as perfectly settled," said the court, "that if the consignor in such a case wishes to prevent the property in the goods and their right to deal with the goods whilst at sea, from passing to the consignee, he must by the bill of lading, make the goods deliverable to his own order and forward the bill of lading to an agent of his own. If he does not do that, he still retains the right of stopping the goods *in transitu*, but subject to that right, the property in the goods and the right to the possession of the goods is in the consignee." Shepherd *v.* Harrison[1] was distinguished by pointing out that the consignor in that case took the precautions to retain control which had been omitted by the consignor in this.

§ 486. Where, however, the bill of lading is not mailed by

[1] L. R. 5 H. L. 116.

the consignor directly to the consignee, but is transmitted by the former to a discounting bank and the bank sends to the consignee the bill of lading, stating at the same time that the property was to be drawn against by the consignor through the bank, the property does not pass unconditionally to the consignee, notwithstanding that the bill of lading is neither made deliverable to order of the consignor nor retained absolutely in the possession of the consignor or his agent. The notification by the bank at the time of delivering the bill of lading that the goods have been drawn against by the consignor, was decided in Cayuga Bank *v.* Daniels[1] to be of the same effect as though the bill of lading had been attached to the draft and possession had been tortiously obtained by detaching the bill of lading without accepting the draft.

§ 487. The fact that the goods were shipped in a vessel owned or provided by the vendee does not in itself rebut the presumption of a reserved control arising from the fact that the bill of lading was made deliverable to the shipper's own order or that of his agent.[2] Nor does the fact that the goods are delivered at the terminus of the transit into an elevator owned by the vendee. Thus, in Dows *v.* The National Exchange Bank,[3] where the vendor's agent directed the carrying vessels on which wheat had been shipped to deliver it to an elevator of which the proprietors were the drawers of drafts against the shipment "to be held subject to and delivered only on payment of the draft," etc., it was held that the drawee's possession was merely that of a bailee and his subsequent sale and delivery of the wheat conferred no title.

§ 488. In the well-known case of Turner *v.* The Trustees of the Liverpool Docks,[4] the plaintiffs' assignors, merchants of Liverpool, ordered a shipment of cotton from Menlove & Co., merchants at Charleston, to be shipped from Charleston upon the purchasers' own vessel. The master signed a bill of lading of the cotton to be delivered at Liverpool "to order or assigns," freight free. Menlove & Co. drew drafts upon the purchasers

[1] 47 N. Y. 631.

[2] Turner *v.* Trustees of the Liverpool Docks, 6 Ex. 543; Moakes v. Nicholson, 19 C. B. N. S. 290; Dows *v.* Nat. Exchange Bank, 1 Otto, 618.

[3] 1 Otto, 618.

[4] 6 Ex. 543.

and desired the latter by letter to insure the cotton. They also sent to them an invoice stating the shipment of the cotton by order and for account and risk of the purchasers. The purchasers having become bankrupt before the arrival of the cotton, Menlove & Co. claimed a right to stop the cotton *in transitu* and it was stored in the warehouses of the defendants. The assignee of the bankrupts having brought detinue, the defendants set up against them the right of Menlove & Co.

It was contended on the part of the plaintiff that by delivery on board the purchasers' own ship, specially appointed for the transportation of the goods in question, the absolute property vested in them, more especially as the statement in the bill that the goods were to be carried freight free, "being owners' property," was inconsistent with the property remaining in Menlove & Co. It was further contended that the captain had no power to alter by his statements in a bill of lading what would otherwise have been an absolute delivery to the vendees. The court held, however, that such was not the case, the terms of the bill of lading effectually reserving to the consignors the *jus disponendi*. "There is no doubt," said the court, "that a delivery of goods on board the purchaser's own ship is a delivery to him, unless the vendor protects himself by special terms restraining the effect of such delivery. In the present case the vendors by the terms of the bill of lading made the cotton deliverable at Liverpool to their order or assigns and there was not, therefore, a delivery of the cotton to the purchasers as owners, though there was a delivery on board their ship. The vendors still reserved to themselves, at the time of delivery to the captain, the *jus disponendi* of the goods, which he, by signing the bill of lading, acknowledged and without which it may be assumed that the vendors would not have delivered them at all. . . . . Whether, as the cotton was actually carried, the owners of the ship, as such, might not be entitled to freight upon a *quantum meruit*, notwithstanding the terms of the bill of lading, is a point not necessary now to determine, but with respect to the question whether the plaintiffs could set up the want of authority in the master as a ground for contending that there was an absolute delivery of the goods, so as to vest the property in the bankrupts immediately upon

delivery, notwithstanding the special terms upon which they were delivered and accepted by the captain, we are clearly of the opinion that it is not competent for them to do so. The want of authority of the master to accept them on such terms will not have the effect of vesting the property in the bankrupts. The case of Mitchell *v.* Ede, 11 A. & E. 260, is a strong authority in favor of the defendants."

§ 489. The cardinal principle in construing instruments of this character being the ascertainment of the parties' intention, the presumption arising from this form of the bill, that the vendor intended to retain such control of the goods as would prevent title from passing to the vendee, may be rebutted by evidence to the contrary. No incontrovertible legal effect is stamped upon the transaction by the use of such a form. The question is one of fact, not of law. It may be shown before a jury that the vendor in causing the bill of lading to be made to his order acted merely as an agent for the vendee. It was admitted by the Supreme Court of the United States in applying the ordinary construction in the case of Dows *v.* The National Exchange Bank,[1] "that where a bill of lading has been taken containing a stipulation that the goods shipped shall be delivered to the order of the shipper, or to some person designated by him other than the one on whose account they have been shipped, the inference that it was not intended the property in the goods should pass, except by subsequent order of the person holding the bill, may be rebutted, though it is held to be almost conclusive. And we agree," continued the court, "that where there are circumstances pointing both ways, some indicating an intent to pass the ownership immediately, notwithstanding the bill of lading—in other words, where there is anything to rebut the effect of the bill, it becomes a question for the jury whether the property has passed." Thus, it may happen, as in the case of Joyce *v.* Swank,[2] that a bill of lading is taken in the name of the shipper, not for the purpose of preventing title from passing to the vendee, but merely as a precautionary retention of title in view of uncertainty as to the vendee's intention to accept the

[1] 1 Otto, 633.

[2] 17 C. B. N. S. 83.

goods upon the terms offered. In that case McCarter, of Londonderry, who had been in the custom of buying largely of Seagrave & Co., of Liverpool, ordered of the latter firm 100 tons of guano. Seagrave & Co. wrote in answer: "We have succeeded in fixing the schooner Anne and Isabella to carry about 115 tons at your limit. We presume we may draw upon you at six months from the date of the shipment at 10*l.* per ton. Please say if you purpose effecting insurance at your end." McCarter replied, referring to the price: "I really cannot understand this, when I know that Mr. L. supplies your guano in Scotland at 9*l.* 15*s.*, net, there to dealers. Beside, I look, as heretofore, for the special allowance made to me at the origin of our transactions; and now that you are making some changes, it may be as well that I should know how we are to get on for the future." He concluded with a request that some flowering shrubs be sent him "in charge of the captain." On the day before writing this McCarter effected an insurance on the guano with the plaintiff, an insurance broker. Seagrave & Co., fearing from the tenor of McCarter's letter that he would not accept the cargo, insured it in their own names and took a bill of lading to order of themselves or assigns. They made out an invoice of "guano delivered to account of McCarter, by Seagrave & Co., per Anne and Isabella," and forwarded it with the bill of lading to a partner then in Ireland. The latter took these papers to McCarter, who expressed his willingness to accept the cargo. Two days afterward the bill of lading was indorsed to McCarter and he accepted a draft for the goods. On the same day news was received of the loss of the cargo at sea two days before. The underwriter of the policy of insurance effected by the plaintiff on behalf of McCarter, refused to pay the same, whereupon this action was brought. The defendant claimed that McCarter had no insurable interest, the title not having passed to him.

It was held, however, that the title had passed to McCarter upon the shipment of the goods, his letter to Seagrave & Co., with regard to the price, not being a repudiation of the contract, but a "grumbling assent" to its terms and such being the case, the mere circumstance that the bill of lading was taken in the name of the vendor and remained unindorsed at

the time of the wreck, could have no effect to prevent the title from passing. If the jury thought, said the court, "that notwithstanding this there were other circumstances sufficiently cogent to induce them to come to the conclusion that the property was intended to pass, I am of opinion that the mere circumstance of the form of the bill of lading and of the invoice being transmitted to the partner then in Ireland, instead of McCarter direct, was not sufficient to annihilate the other evidence in the cause, though it might induce the jury to pause." The contract was held to have been complete and the plaintiff entitled to recover.

§ 490. In Hobart *v.* Littlefield,[1] Morgan, a cotton broker of Providence, at the request of the defendants, telegraphed to the plaintiff, a commission merchant at Galveston: "Littlefield offers 13½ f. o. b.[2] and freight for fifty bales; fill part, if can't whole." The offer was a few days afterward accepted. A few days after the acceptance the cotton was carried to the dock of the steamship line by which it was intended to ship it, a bill of lading being given shortly after. On January 27th, the day after the issue of the bill of lading, the plaintiff wrote to the defendants, notifying them of the purchase and inclosing an invoice of —— bales of cotton, bought for account and risk of defendants. On January 29th, a part of the cotton was burned on the dock. The plaintiffs brought this action to recover the price of the cotton burned. It appeared that the bill of lading, with a blank indorsement, was attached to a sight draft and sent by the plaintiffs to a bank, to collect the one and deliver the other. It was contended, therefore, by the defendants that the property was still in the plaintiff's control at the time of the fire and there consequently could be no recovery. The court held, however, that the property had passed; that it did not follow from the fact of the plaintiff's control at the time of the fire that the title and risk were not in and on the defendants. All the cases upon the reservation of the *jus disponendi*, said the court, hold that it is a question of intention, to be gathered from the facts. "In the present case the title might pass on the completion of the bargain and the selec-

[1] 13 R. I. 341.

[2] "Free on board."

tion and appropriation of the cotton to that purpose, in such a manner that the goods would be at the buyer's risk and yet the seller retain possession of them, by himself or by the master, as his bailee and agent, until paid. If the retention of the bill of lading was merely to retain the possession of the cotton for this purpose, then the title and the risk belonged to the defendants. And in this case all the other facts tend to show that the vendors at least considered that they had parted with the title and risk. The invoice made out before the fire was of cotton bought by E. Hobart & Co., by order of J. Morgan, Esq., 'for account and risk of Messrs. Littlefield Bros.'"

§ 491. Where the transaction is between a consignor and a consignee, who are respectively owner and factor instead of ordinary vendor and vendee, the consignment vests title in the consignee only as agent of the shipper, unless he be the latter's creditor and the shipment is made in satisfaction of the debt. Although as to third parties with whom the consignee may deal as the owner of the goods, he may be treated as such owner under the various Factors' Acts, he has, as against his consignor, only such a special property as is necessary for fulfilling the purposes of his agency. It frequently happens, however, that there is a debt due from the principal to his factor and that the latter claims title to a cargo by virtue of his factor's lien. Such a right cannot be exercised (unless by virtue of an express or implied contract to the contrary) until the property comes into the factor's possession.[1] The possession of a bill of lading, however, indorsed and delivered to a factor having a balance of account in his favor, is for this purpose equivalent to actual possession of the goods, where it clearly appears from the circumstances of the case that the consignor intended, in delivering the goods to the carrier, to vest the property in the

[1] Kinlock *v.* Craig, 3 T. R. 786; Mitchell *v.* Ede, 11 Ad. & El. 888; Bruce *v.* Wait, 3 Mees. & W. 15; Clark *v.* Great Western Ry. Co., 8 N. C. C. P. 191; Ryburg *v.* Snell, 2 Wash. C. C. 294; First Nat. Bank *v.* Dearborn, 115 Mass. 219; Bank of Rochester *v.* Jones, 4 N. Y. 497; Allen *v.* Williams, 12 Pick. 297; Winter *v.* Cort, 7 N. Y. 288; Grosvenor *v.* Phillips, 2 Hill, 147; Woodruff *v.* Nashville, etc., R. Co., 2 Head (Tenn.), 87. There must also be a right of property in the goods in the principal. Tison *v.* Howard, 57 Ga. 410.

consignee.[1] Where payments have actually been made, or bills of exchange accepted, upon the faith of consignments to be made by bill of lading, a consignment in pursuance of such an arrangement, whether to cover a general balance of account or an advance upon the particular cargo, will be construed a specific appropriation of the property to the payment of the consignor's debt and the factor's possession of the bill of lading will be considered possession of the goods. To defeat his possession, the consignor's creditors have no greater rights than the consignor himself.[2] The claim of a consignee for advances is preferred to that of an attaching creditor, when the former receives the bill of lading previously to the levy of the attachment.[3] That he did receive it before the levy, must appear affirmatively.[4]

§ 492. It is necessary, however, to bear in mind the distinction between transactions in which the parties deal in the relation of principal and factor and those in which the consignee, (though he has previously acted as simply a factor and ordinarily sustains that relation alone) rises by virtue of such a contract as that under consideration, to the position of a virtual vendee of the goods. In such a case the principles by which the passage of property is regulated in adjusting the respective claims of a vendee and vendor or of a vendee and his vendor's creditors, are applied as in ordinary cases. Where in such cases, therefore, the bill of lading is transmitted to the consignee and there are no circumstances pointing to an intention to retain control of the title, the latter vests in the factor-consignee immediately upon the delivery of the goods to the carrier.[5]

[1] Rice *v.* Austin, 17 Mass. 197; Vallé *v.* Cerré, 36 Mo. 575; Davis *v.* Aubin, 24 Vt. 55; Wade *v.* Hamilton, 30 Ga. 450; Haille *v.* Smith, 1 Bos. & Pul. 563; Bryans *v.* Nix, 4 M. & W. 775; Evans *v.* Nichol, 4 Scott N. R. 43; Vertue *v.* Jewell, 4 Campbell, 31; Cuming *v.* Brown, 9 East, 506; Patten *v.* Thompson, 5 M. & S. 350. *Contra*, Oliver *v.* Moore, 12 Heiskell (Tenn.), 482; Saunders *v.* Bartlett, ib. 316.

[2] Adone *v.* Seeligson, 54 Tex. 593; Laughlin *v.* Gonahl, 11 Robinson, 140.

[3] Vallé *v.* Cerré, 36 Mo. 575; Park *v.* Porter, 2 Robinson, 342.

[4] Hyde *v.* Smith, 12 La. 144.

[5] Grosvenor *v.* Phillips, 2 Hill, 147; Holbrook *v.* Wright, 24 Wend. 169; Haille *v.* Smith, 1 Bos. & Pul. 563; Vertue *v.* Jewell, 4 Campbell, 31; Anderson *v.* Clark, 2 Bing. 20.

As was said by PARKE, B., in Bryans *v.* Nix,[1] "If the intention of the parties to pass the property, whether absolute or special in certain ascertained chattels, is established and they are placed in the hands of a depositary, no matter whether such depositary be a common carrier or shipmaster employed by the consignor or a third person and the chattels are so placed on account of the person who is to have that property and the depositary assents, it is enough. And it matters not by which documents this is effected; nor is it material whether the person who is to have the property be a factor or not; for such an agreement may be made with a factor as well as any other individual."

It must also be remembered, however, that in accordance with the principle that a bare consignment will not in itself constitute the consignee an owner, a shipper who has not completely deprived himself of the *jus disponendi* may prevent the property from vesting in his creditor by indorsing the bill of lading for value to another, even where the shipment has been promised to the consignee in satisfaction of the latter's advances.

[1] 4 Mees. & W. 791.

CHAPTER XXXV.

THE TRANSFER OF THE BILL.

The bill is transferable by indorsement and delivery, § 493.
Title may be passed by other modes of assignment, § 494.
When the carrier need require no indorsement to warrant a delivery, § 495.
Title may be transferred by the delivery of the bill unindorsed, §§ 496, 497.
The same—English authorities, §§ 498, 499, 500.
The same—German code, § 501.
The delivery must be with an intent to pass property in the goods—When the intention is a question for the jury, §§ 502, 503, 504.
Delivery of a bill containing no words of negotiability, §§ 505, 506, 507.
The effect of a transfer varies with the intention, § 508.

§ 493. The ordinary and proper mode for the transfer of a bill of lading is by indorsement and delivery to the party for whose benefit the transfer is intended. What rights are passed by such a transfer, is a distinct question. Such rights under the bill as are transferable from the original holder to another are, however, transferred in this mode, as effectually as though the holder in addition to making the indorsement and delivery had entered into a separate contract with the transferree to convey to the latter all the rights of a holder of the bill. Authorities need not be cited in support of this proposition, since it is merely equivalent to saying that the bill of lading is quasi negotiable or transferable, a principle which underlies all the cases.[1]

§ 494. The title to the goods may of course be passed by the owner by a separate instrument or by an independent assignment indorsed upon the bill, as well as by the ordinary indorsement. Where the shipper is the owner, even though he is not the

[1] In The Thames, 14 Wall. 98, a case in point, Mr. Justice Strong referred to the following authorities: Conrad *v.* Atlantic Ins. Co., 1 Peters, 445; Gibson *v.* Stevens, 8 How. 384; Thompson *v.* Downing, 14 Mees. & W. 403; Caldwell *v.* Ball, 1 Term, 205; Wright *v.* Campbell, 4 Burrow, 2051; Evans *v.* Marlett, 1 Ld. Raymond, 271; Walter *v.* Ross, 2 Wash. C. C. 283.

consignee and the bill of lading is not made to his order, he may by such an assignment pass a title to the goods which is valid against all parties except a *bona fide* indorsee for value of the bill itself.[1]

§ 495. Where a bill of lading is presented by the person named therein as the party to whom the goods are to be delivered there is no necessity for an indorsement. In such a case the delivery is valid, although the party presenting the bill is the holder of only the second of a set of bills and the first has been indorsed to a *bona fide* pledgee for value,—the carrier or its agents not being chargeable with notice of such pledge.[2]

§ 496. A valid title to the goods specified in a bill of lading may be acquired by the delivery of the bill without any indorsement and this, whether the bill be drawn to the consignor's order, or to bearer, or to neither order nor bearer.[3] It being remembered that the bill is regarded as symbolically the goods themselves, it necessarily follows that a delivery of the bill, with the intention of passing the title, ought to operate as conclusively to effectuate that intention as the manual transmission of the goods to the holder, were such transmission possible. The modes of delivery and acceptance in effecting a sale or pledge of personal property must necessarily vary with the nature and location of the subject of the sale. The ever-increasing complexity and rapidity of modern commercial transactions demand that muniments of title to personal property shall pass easily from owner to owner, unembarrassed by over-nice legal technicalities. The law accordingly favors the doctrine of constructive delivery and acceptance and where it finds clear evidence of an intention to pass title by the delivery of a bill of lading, it will not permit that title to be invalidated by reason of the mere omission of a form. It will require neither an indorsement nor any other written assignment.[4]

[1] Conard *v.* Atlantic Ins. Co., 1 Pet. 445.

[2] Glynn *v.* East and West India Docks Co., L. R. 7 App. 591. See Weyand *v.* Atchison, etc., R. Co., 75 Iowa, 573.

[3] Mailing the bill addressed to the indorsee, *it seems*, is a sufficient delivery. Buffington *v.* Curtis, 15 Mass. 528.

[4] Bank of Green Bay *v.* Dearborn, 115 Mass. 219; Bank of Rochester *v.* Jones, 4 N. Y. 497; Holmes *v.* German Security Bank, 87 Pa. St. 525;

§ 497. In the Bank of Rochester *v.* Jones,[1] the possession of a carrier's unindorsed receipt by a bank which, upon obtaining it, discounted a draft, the acceptance of which it was intended to secure, was held sufficient to enable the bank to maintain trover against the drawee, who refused to accept and obtained possession of the goods by illegally detaching and retaining the receipt as security for advances upon previous consignments. "The possession of the carrier's receipt, although not indorsed or formally transferred, was evidence to the carrier that the bank was entitled to possession of the flour." "The delivery of the carrier's receipt to the bank was a symbolical delivery of the flour."

In Holmes *v.* The German Security Bank,[2] a bank discounted a draft with an unindorsed bill of lading attached as security for its payment. The consignee refused to pay the draft and afterward received and sold the property and applied the proceeds to a previously contracted debt of the consignor. It was held that the bill being attached to the draft as security for the payment of the latter, it was evidence of the appropriation of the proceeds of the sale of the property, whether the bill was indorsed or not and the consignee could not, therefore, apply them to an old debt of his own. This case was followed in Holmes *v.* Bailey.[3]

§ 498. Some of the English authorities have been interpreted as holding that an indorsement as well as a delivery of the bill of lading is necessary in order to pass title to the goods,—title being passed by delivery of an unindorsed bill only where

Holmes *v.* Bailey, 92 ib. 57; Allen *v.* Williams, 12 Piek. 297; Becker *v.* Hallgartine, 86 N. Y. 167; Merchants' Bank *v.* Union Railroad Co., 69 ib. 373; Campbell *v.* Alford, 57 Texas, 159; Michigan Cent. R. R. Co. *v.* Phillips, 60 Ill. 190; Davenport Bank *v.* Homlyer, 45 Mo. 145; Jeffersonville, etc., R. R. Co. *v.* Irwin, 46 Ind. 180; Nathans *v.* Giles, 5 Taunt. 558; Cayuga Bank *v.* Daniels, 47 N. Y. 631; Pettit *v.* First National Bank of Memphis, 4 Bush (Ky.), 334; Marine Bank *v* Wright, 46 Barb. 45; Fowler *v.* Meikleham, 7 Lower Can. 367; Glidden *v.* Lucas, 7 Cal. 26; City Bank *v.* Rome, etc., R. R. Co., 44 N. Y. 136; Skilling *v.* Bollman, 6 Mo. App. 76. The rule applies to warehouse receipts. St. Louis Nat'l Bank *v.* Ross, 9 ib. 399.

[1] 4 N. Y. 497.

[2] 87 Pa. St. 525.

[3] 92 ib. 57.

actual possession of the property has been obtained. This statement of the effect of those cases, however, is too broad. They by no means go to the length of holding that the delivery of an unindorsed bill of lading, with the intention of passing the title and right of possession, will not effectually produce the desired effect unless possession be actually obtained. They determine only what is conceded in America as well, that the simple delivery or transmission of a bill will not of itself entitle the holder to the goods where precedent or concurrent acts of the shipper or owner clearly indicate an intention to reserve the *jus disponendi*, or to retain control of the shipment until certain conditions should be performed, *e. g.*, until bills of exchange drawn against the goods should be accepted or paid.

§ 499. Thus, in Brandt *v.* Bowlby,[1] a case sometimes cited in support of the statement that in England indorsement of the bill is necessary to pass title, one Berkeley gave orders to the plaintiffs to purchase wheat for him. The plaintiffs accepted the orders, but Berkeley subsequently wrote to them cancelling the contract. The plaintiffs wrote to Berkeley that they had made the purchases and would ship the wheat addressed to H. & Co., expressing the hope that he would approve of what they had done notwithstanding his last-mentioned letter. The wheat was shipped. The plaintiffs informed Berkeley by letter that they had shipped it on his account and had forwarded an indorsed bill of lading to H. & Co., drawing upon the latter for a part of the price and upon him for the residue. They inclosed an unindorsed bill of lading to Berkeley and an invoice of the wheat stating that it was bought for his order and on his account. The bills of lading were not accepted and the plaintiffs' agent notified Berkeley that he would retain the whole of the wheat for the plaintiffs. Berkeley afterward again became desirous of having the wheat and the master of the vessel in which it was shipped delivered it to his order. The plaintiffs brought their action against the ship-owners for not delivering the wheat to their order and recovered. There is in the decision, however, no trace of an opinion that an indorsement is necessary where

[1] 2 B. & Ad. 932.

the bill is delivered with an intention of passing title. The decision is rested solely upon the ground that the delivery of the bill of lading to Berkeley was conclusively shown by the accompanying acts of the plaintiffs to be without such intention. The correspondence was held to clearly manifest an intention that the property should not vest in Berkeley until the bills of exchange were accepted.

§ 500. So, in Waite *v.* Baker,[1] it was held, not that title could not be effectually passed by delivering an unindorsed bill of lading with that intention, but that the consignor's mere leaving of an unindorsed bill deliverable to order or assigns of the shipper, at the office of the contemplated vendee, would not constitute of itself such an appropriation of the goods "in that sense of the term which alone would pass the property," where the attendant circumstances indicated clearly an intention to reserve control of the goods.

The subject of reserving the *jus disponendi* as affected by the issuance of bills of lading is examined in another part of this treatise. What is established by the English authorities is not in conflict with the rule that bills of lading may ordinarily pass by delivery alone.[2]

§ 501. It was decided in Becker *v.* Hallgarten,[3] that the provision of the commercial code of the German Empire, that the transfer of legal title to goods covered by a bill of lading can be made only by written indorsement by the consignee, applies only when the bill is taken in the name of the vendee or of some person through whom the party claiming its benefit must make title.

§ 502. To enable the party to whom the bill of lading is thus delivered without indorsement or other assignment to claim a general or special property in the goods represented thereby, there must of course have been a delivery with the intent to pass such title. Such intention is shown by the attendant circumstances. It is usually a question for the jury and there-

[1] 2 Ex. 1.

[2] In California it is provided by statute that when a bill of lading is made to "bearer" or in equivalent terms, a simple transfer thereof by delivery, conveys the same title as an indorsement. Civ. Code, § 2128.

[3] 86 N. Y. 167.

fore in an appeal to a higher court, it is to be assumed that the jury has passed upon it.[1]

Where, however, the evidence entirely fails to disclose anything more in the transaction in which the bill was delivered than a mere loan to the owner of the goods, secured by the transfer of the unindorsed bill, the question of intention is of course withheld from the jury. Such a delivery of unindorsed bills as mere collateral, passes no title to the goods.[2]

§ 503. So where no intent to pass title is expressed and there is no fact, such as the payment of a consideration, from which the law could imply such an intent, the mere transmission of an unindorsed bill to a person having no other basis for his claim to the goods will not vest in him any title to them. In such a case the delivery of a part of the goods to the holder of such a bill will not estop the carrier from denying the holder's claim to the residue.[3]

§ 504. A delivery alone is sufficient not only where the bill is drawn to the consignee "or order," but (provided, of course, that the attendant circumstances evince a clear intention to pass title by such delivery), where upon its face it amounts to simply the carrier's receipt and contains no stipulation for the delivery of the goods to any party but the one to whom they are consigned. The mere omission of words of negotiability from an instrument which by its nature and intent is quasi-negotiable, cannot render it non-negotiable and being negotiable to the same extent as similar instruments containing such words, there can be no reason why it should not be to the same extent negotiable by delivery.

In Bank of Green Bay *v.* Dearborn,[4] the plaintiff had discounted a draft drawn against a quantity of flour and its title depended upon a carrier's receipt delivered to it by the consignor without any written indorsement and containing no words of negotiability. The consignees refused to receive the goods upon their arrival at their destination and notified a creditor of the consignor that they had no claim to them,

[1] Merchants' Bank *v.* Union Railroad Co., 69 N. Y. 373; Cayuga Bank *v.* Daniels, 47 ib. 631; Bailey *v.* Hudson River Railroad Co., 49 ib. 70.

[2] Bissell *v.* Steel, 67 Pa. St. 443.

[3] Stone *v.* Swift, 4 Pick. 389.

[4] 115 Mass. 219.

whereupon the creditor attached the goods as the property of the consignor. The discounting bank brought replevin against the attaching officer. The court held that the delivery of the bill of lading vested a valid title to the goods in the bank and gave it a right to maintain the action, Mr. Justice AMES saying, "It is true that a receipt of this kind does not purport on its face to have the quasi-negotiable character which is sometimes said to belong to bills of lading in the ordinary form; neither does it purport in terms to be good to the bearer. But independently of any indorsement or formal transfer in writing, the possession and production of it would be evidence indicating to the carrier that the bank was entitled to demand the property, and that he would be justified in delivering it to them. There are cases in which the delivery of a receipt of this nature, though not indorsed or formally transferred, yet intended as a transfer, has been held to be a good symbolical delivery of the property described in it. In Haille *v.* Smith,[1] EYRE, C. J., uses this language: 'I see no reason why we should not expound the doctrine of transfer very largely upon the agreement of the parties, and upon their intent to carry the substance of that agreement into execution.'"

§ 505. The Bank of Green Bay *v.* Dearborn[2] has met with what would seem to be an adverse criticism in a later Massachusetts case, Hallgarten *v.* Oldham.[3] In that case the contest was between the pledgee of a warehouse receipt and an attaching creditor of the pledgor. The receipt contained a promise to "deliver to him," the owner, upon the payment of charges, etc. It was indorsed in blank by the pledgor and delivered to the plaintiff. No notice of this was given to the warehouseman by the plaintiff until after the levy of the defendants' attachment. The court held that enough had not been done to give the plaintiff a valid title against the attaching creditor, since the delivery or change of possession required by the case of Lanfear *v.* Sumner,[4] in a case like that under consideration, where the goods were in the hands of a middleman, "could only be brought to pass by his becoming the servant of the purchaser for the purpose of holding the goods;" that the

[1] 1 B. & P. 563.
[2] 115 Mass. 219.
[3] 135 ib. 1.
[4] 17 ib. 110.

middleman could become such only by his own consent; that "it may or may not be true that, if a warehouse receipt contains an undertaking to deliver to order, that undertaking is to be regarded as an offer by the warehouseman to any one who will take the receipt on the faith of it, and that it will make him warehouseman for the indorsee without more, on ordinary principles of contract;" but that as the warehouse receipt under consideration contained no such undertaking, the warehouseman could not be considered to have attorned by the mere indorsement and delivery to the plaintiff.[1]

The court, by Mr. Justice Holmes, said: "It is true there are one or two decisions of this court which it is somewhat hard to reconcile with the foregoing principles. The strongest of these is Green Bay National Bank *v.* Dearborn." . . . . "It will be observed that the document [in the latter case] did not run to order, and was not indorsed, so that it could not be argued that the railroad company had attorned in advance, and there was no notice to the company, so that it had not made itself the plaintiff's bailee subsequently, if ordinary principles were to be applied." "But whatever the scope of Green Bay National Bank *v.* Dearborn, we cannot apply it as a precedent in the present case, so long as Lanfear *v.* Sumner stands. When a private warehouseman, who has an unfettered right to choose the persons for whom he will hold, gives a receipt containing only an undertaking to his bailor personally, without the words, "or order," or any other form of offer or assent to hold for any one else, it is impossible to say that a mere indorsement over of that receipt will make him bailee for a stranger."

§ 506. Language so positive as this would seem, indeed, to amount to a rejection of the principle of the case criticised. Hallgarten *v.* Oldham[2] is believed to be the latest case upon this subject in Massachusetts. It is submitted however that of the two cases, that first decided contains the more intelligently and liberally reasoned conclusion and that the narrow

[1] There is also a *dictum* in the case of Henderson *v.* The Comptois d'Escompte de Paris, L. R. 5 P. C. 260, to the effect that "in order to make bills of lading negotiable, some words as 'or order or assigns' ought to be in them," such being "the general view of the mercantile world for some time."

[2] 135 Mass. 1.

rule of the last is inconsistent with the general modern view of the doctrine of transfer. It should be added that in deciding Hallgarten *v.* Oldham[1] the court was guided, not altogether by what it there enunciated as rules of common law, but by the provisions of the Massachusetts statute relating to warehouse receipts. The court concluded its opinion by saying, "We are confirmed in the view we take by observing that the legislature, in dealing with public warehousemen, and providing that 'the title to goods stored . . . . shall pass to a purchaser or pledgee by the indorsement and delivery to him of the warehouseman's receipt,' as a preliminary to that result expressly requires that the receipt 'shall be negotiable in form.'"

§ 507. Hallgarten *v.* Oldham,[2] indeed, does not militate against the general principle that an ordinary quasi-negotiable bill of lading or warehouse receipt may be validly transferred by delivery alone, for the question there arose upon an instrument that was not only delivered but indorsed. The real question was not as to the mode of negotiating the instrument, but as to its negotiability in any mode, when words of negotiability are absent. The case has been noticed at this point, however, because it has seemed to overthrow a distinct decision of the point that if a bill of lading or warehouse receipt is negotiable at all, it is negotiable by a delivery alone with an intent to thereby pass title.

§ 508. The effect of the indorsement and delivery of a bill of lading varies according to the intention of the parties. It consequently renders the bill a muniment of various kinds of title: absolute, defeasible, special, conditional, or merely formal, since the intention may be either to pass the whole property in goods already paid for; to pass that property subject to an unpaid vendor's right to assert his lien for the price by stopping the goods in transit; to create a mortgage or pledge of the goods as security for an advance; to pass a title which shall become absolute only on the performance of certain conditions, usually the acceptance or payment of drafts for the price, or to pass only such a merely apparent title as would enable an agent to sell the goods or stop them in transit. These subjects are treated elsewhere, in their appropriate places.

[1] 135 Mass. 1. [2] Ib.

CHAPTER XXXVI.

THE BILL OF LADING AS A COLLATERAL SECURITY.

Character of the pledgee's title, §§ 509, 510.
Pledgee has such property as will enable him to maintain replevin, § 511.
Pledgee's title is paramount to the right of stoppage *in transitu*, § 512.
No title passes unless the bill is delivered, § 513.
Forwarding a bill attached to a draft for the price of goods is not necessarily a delivery to the party discounting the draft, §§ 514, 515.
Pledgee's rights are paramount to those of a consignee, §§ 516, 517.
Pledgee's rights are paramount to those of a consignee to whom the consignor is indebted beyond the value of the goods, § 518.
Agreements between a consignor and a consignee that the shipment shall be appropriated to the payment of the former's debt are immaterial, § 519.
Consignee's ignorance of the pledge is immaterial, § 520.
Pledgee's title is conditional, § 521.
The same—whether the transaction is a mortgage or a pledge, is immaterial, § 522.
The pledgee's title defeated by acceptance rather than payment of the draft, §§ 523, 524.
The rule holds where the draft has been sent to an agent for collection, §§ 525, 526.
The bill may be made security for the payment by express agreement, § 527.
Consignee cannot claim possession until he accepts or pays the draft, § 528.
Pledgee is liable in damages for a refusal to deliver upon the consignee's acceptance or payment of the draft, § 529.
Pledgee's right is not divested by the consignee's obtaining possession of the goods without acceptance or payment of the draft, § 530.
Nor by the consignee's own delivery of the goods where in trust for the redemption of the pledge, § 531.

§ 509. Bills of lading are frequently transferred where the transaction is not intended to give permanent ownership, but to furnish security for advances made upon the faith of the transfer. Few transactions in the commercial world are more frequent than the transfer of bills of lading as collateral security

to a bank or other pledgee making an advance upon the credit of the pledgor's ownership therein indicated. It has become the customary mode of purchase and sale between parties who require the services of a carrier for delivery, for the consignor to draw a draft for the price upon the consignee, which, with the bill of lading attached, or accompanying it, he procures to be discounted by a bank or private capitalist. The latter holds the bill of lading as security for the consignee's acceptance or payment of the draft through the holder's agent at the terminal point of the transit and delivers it to the consignee upon such acceptance or payment. In some cases a pledge is created by the consignee's delivering the bill of lading to a bank as security for a loan by the latter for the payment of the purchase price.

§ 510. Such a transfer of the bill of lading is a pledge of the goods themselves and, unless circumstances indicative of a different intention appear, it constitutes *prima facie* evidence of an intention to pass to the pledgee a title to the goods which shall protect him to the extent of his advances upon them. Unless a different agreement is expressly made, the pledge will be construed as intended to protect the pledgee only until he has been placed in possession of another security, namely, the accepted draft for the price. The character of the pledgee's title in such a transaction has sometimes been inaccurately stated. Language has been used which would seem to indicate an opinion that such a pledgee is clothed with the same complete and absolute legal ownership as an actual proprietor of the goods. That such is not the case follows from the principle already discussed, that a transferree of a bill of lading has only such property in the goods as was within and necessary to effectuate, the intent of the transfer. It is nevertheless true and strictly in accordance with such principle, that no distinction is observed between the rights of one to whom such a bill is transferred as collateral and those of an actual purchaser of the goods, so far as the exercise of those rights is necessary for the holder's self-protection. So far as it is necessary to afford and enforce this protection, the pledgee holds the legal title to the goods and is entitled, in respect

of them, to all the rights and remedies of a purchaser for value.[1]

§ 511. Accordingly, one who holds a bill of lading as collateral security for an advance is entitled to maintain an action of replevin to recover them from an officer who has attached them at the suit of the shipper or any one claiming under him. Although the delivery of the bill of lading to a bank or other party as security for the payment of advances may not enable the pledgee to sue the carrier upon the contract made with the shipper, it nevertheless creates such a special property in the goods as will entitle the pledgee to immediate possession and enable him to obtain it by replevin.[2]

§ 512. A *bona fide* holder of a bill of lading as collateral security has a title to the goods which is paramount to the unpaid vendor's right of stoppage *in transitu*. His right is the same whether the consideration for the transfer of the bill passed at the time of the transfer or was the payment of an antecedent debt. A discussion of this subject will be found in the succeeding chapter.

§ 513. The question may arise, whether a pledgee's title to the goods specified in a bill of lading must be created by a particular mode of transfer. The general subject of transferring title has been considered and it has been seen that in general a valid transfer may be made by the indorsement and delivery of the bill, or by its simple delivery without indorsement. In the case of a pledgee, as in any other, it is absolutely necessary that there shall be a delivery of the bill. If there be no delivery of the bill, one who discounts a draft, expecting a future delivery of the bill and relying upon it, nevertheless obtains no title to or lien upon the goods, although the draft contains upon its face a memorandum that it is drawn "against" the goods and although the consignee to whom the bill is sent

[1] Dows *v.* National Exchange Bank, 1 Otto, 618; Tilden *v.* Minor, 45 Vt. 195; Farmers and Mechanics' Bank *v.* Logan, 74 N. Y. 568; Petitt *v.* First National Bank of Memphis, 4 Bush, 334; First Nat. Bank *v.* Kelly, 57 N. Y. 34; Commercial Bank *v.* Pfeiffer, 22 Hun, 327; Marine Bank *v.* Wright, 48 N. Y. 1; Allen *v.* Williams, 12 Pick. 397; Marine Bank *v.* Fiske, 71 N. Y. 353.

[2] Fifth Nat. Bank *v.* Bayley, 115 Mass. 228; Bank of Green Bay *v.* Dearborn, ib. 219.

is notified by the consignor that the draft was drawn upon the security of the goods.[1] In such a case the party discounting the draft can maintain no action against the consignee and of course no right of recovery is created by a subsequent delivery of a duplicate bill of lading.

§ 514. That there must be a delivery of the bill to the pledgee is settled beyond doubt. The further question remains, What constitutes a delivery? Whether or not, when a bill of lading is sent with a draft for the price of the goods to the purchaser, the bill is intended to be delivered to the party discounting the draft and retained by him as security for payment, rather than to the purchaser, is a question of intention and is in substance the question, whether the pledgee's title is defeated by payment of the draft or by acceptance. It is a question of intention which must be answered by reference to some express agreement of the parties; to their previous course of dealing; or to the existence of a well-settled usage of trade which is recognized and acted upon in both of the places between which the transaction takes place.

§ 515. It was laid down, however, in Mears *v.* Waples[2] that the bare fact that a bill of lading is forwarded attached to a draft and not separately, does not, unless by virtue of a particular or general usage, necessarily indicate an intention to make the bill of lading a security for the payment of the draft. The draft and the bill of lading are not in such a case in any sense a single instrument in law. "On the latter point," said the court, "it must be clear that the mere connection of the two papers by a pin could not alter the legal operation of either instrument. The operation of each depended only upon its own terms; nor could they be made in any sense one instrument, or the operation of one be qualified by the other, except by some reference in the one to the other; as if in the bill of lading, for example, it had been provided that the title under it to the cargo should not pass until payment of the

[1] Exchange Bank *v.* Rice, 107 Mass. 37.

[2] Mears *v.* Waples, 4 Houston (Del.), 62. See also The John K. Shaw, 32 Fed. Rep. 491; Batavia Bank *v.* N. Y., L. E., etc., R. Co., 106 N. Y. 195.

draft. Then, again, with respect to the conclusiveness of this fact (the connection of the two papers) in itself as evidence of an intention to pledge the bill of lading for payment, while it is doubtless true that the papers were connected for some purpose, it is not to be assumed that this purpose was to make the bill a security for payment of the draft, for the object may as well have been to make the delivery of the bill and the acceptance of the draft contemporaneous, so as, on the one hand, to secure the vendor an acceptance of the draft before delivery of the bill of lading, and, on the other hand, to assure the acceptor that the goods had gone forward." In this case it was held that the other circumstances pointed to a sale not for cash, but on the personal credit of the purchaser, to be secured by the bill of lading. It is to be observed, however, that where a custom is proved that a bill of lading, when attached to a draft for the price of goods shipped, stands as security for the payment of the draft, the bill will be so treated. In Mears *v.* Waples[1] it was decided merely that in that case such a custom had not been proved, either in the trade generally or in the dealings of the parties. In the latter, on the contrary, it appeared that in a considerable course of previous transactions the bill had in every case been detached. The court tacitly recognized, however, the existence of a mercantile usage needing no proof that the bill of lading shall in such case stand as security for at least the acceptance of the draft and that the forwarding of the bill and draft together in the manner indicated constituted a delivery of the bill for that purpose.

§ 516. One to whom a bill of lading has been pledged by a consignor as collateral security for the discount of a draft, or an advance otherwise made upon the security of the goods, obtains a valid, though conditional, title to the goods, not only as against the consignor, but as against the consignee. The fact that a certain person's name has been inserted in the bill can have in itself no effect in transferring to them property in the goods, for no title passes under a bill until it is delivered. The insertion of the name is made in the case of a pledge as collateral for the discount of a draft drawn against the goods merely in the expectation that the party named will entitle

[1] 4 Houston (Del.), 62.

himself to possession of the goods according to the terms of the contract by accepting the draft.[1]

A simple consignment of goods may be explained by parol to have been intended as evidence of an absolute sale, a trust, a mortgage, a pledge, or a mere agency. "There is nothing final or irrevocable in its nature. The owner of the goods may change his purpose at any rate before the delivery of the goods themselves, or of the bill of lading, to the party named in it, and may order the delivery to be to some other person."[2] When the bill is made deliverable to the order of the shipper, there can be no question of his intention to preserve the *jus disponendi;* nor when the consignment is merely to the shipper's agent. So where the bill is made deliverable to a vendee or bearer.[3] In any case the simple appearance of a consignee's name in the bill gives to him no right to the goods which can be asserted against the superior equity of a *bona fide* advance to the consignor upon the security of the bill.

§ 517. The pledgee may, however, waive his rights, or be guilty of such negligence as to defeat them. Thus, in Douglass *v.* People's Bank,[4] a bank was in the habit of permitting the pledgor to withdraw bills and substitute others for the purpose of allowing the pledgor to obtain the freight. The pledgor withdrew certain bills, presented them to the carrier, obtained the freight and returned them to the bank. The court held that the carrier was not liable therefor to the bank.

§ 518. This is true, though the consignor be indebted to the consignee upon general account in a sum greater than the value of the goods.[5] Thus, in The Bank of Rochester *v.* Jones,[6] the

[1] First National Bank of Cairo *v.* Crocker, 111 Mass. 163; Bank of Rochester *v.* Jones, 4 N. Y. 497; Allen *v.* Williams, 12 Pick. 297; Pratt *v.* Parkmann, 24 ib. 42; Taylor *v.* Turner, 87 Ill. 296; Batavia Bank *v.* N. Y., L. E., etc., R. R. Co., 106 N. Y. 195; Boatman's Savings Bank *v.* West., etc., R. Co., 81 Ga., 221; Chester Nat. Bank *v.* Atlanta, etc., R. Co., 25 S. C. 216.

[2] Mitchell *v.* Ede, 11 Ad. & Ell. 888; Conard *v.* Atlantic Ins. Co., 1 Peters, 444.

[3] Allen *v.* Williams, 12 Pick. 297.

[4] Am. and Eng. R. Cases, 510, S. C.; 5 Southwest Rep. 420.

[5] Bank of Rochester *v.* Jones, 4 N. Y. 497; Allen *v.* Williams, 12 Pick. 297; First Nat. Bank of Cairo *v* Crocker, 111 Mass. 163; Wilmerding *v.* Hart, Hill & Denio (Suppl.), 305.

[6] 4 N. Y. 497.

owner of a quantity of flour consigned it to the defendant, Jones, who was his regular factor. He drew a draft upon Jones for the price and obtained a discount of the draft from the plaintiff upon delivering to it the bill of lading and agreeing that it should hold the bill as security for Jones' acceptance of the draft. Upon presentation of the latter Jones refused to accept, detached the bill from the draft, retained it and thereby obtained possession of the goods, the proceeds of which he claimed the right to apply to advances made by him to the shipper on previous consignments. The bank was held entitled to recover against Jones in an action of trover,—the defendant having acquired by the consignment no right to the flour except upon condition of accepting the draft. Having refused to accept, he became a wrong-doer by taking and converting the flour.

§ 519. Even where the consignors, having overdrawn their account with the factor, have expressly promised to "make it all right at the next shipment," the consignee does not obtain thereby an absolute title to goods forwarded at the next shipment. Where a draft has been drawn against the shipment and discounted in the usual manner, the consignee is in no better position than if the promise had not been made. For the contract was a purely executory one and the actual transaction is clearly indicative of an intention on the part of the shipper that it shall not constitute a performance thereof.[1] Any agreement of this kind between the consignor and the consignee is entirely immaterial in adjusting the rights of one who has in good faith taken a bill of lading from the consignor to secure himself in an advance made upon the goods. Of such a case the Supreme Court of Illinois said in a recent case:[2] "It is, however, claimed that there was here a pre-existing agreement between Trotter [the consignor] and Taylor [the consignee], which placed the former under obligation to send his wheat to the latter, to be sold by him for the reimbursement of his advances made on the credit of grain to be consigned to him by Trotter; that Taylor was largely in such advance at

[1] First National Bank of Cairo *v.* Crocker, 111 Mass. 163.

[2] Taylor *v.* Turner, 87 Ill. 296; see also Cayuga Bank *v.* Daniels, 47 N. Y. 631; Marine Bank *v.* Wright, 48 ib. 1; Chopin *v.* Clark, 31 La. Ann. Rep. 846; Halsey *v.* Warden, 25 Kan. 128.

the time of this transaction and that under such circumstances, at least, the delivery of the wheat on the railroad, consigned to Taylor, as well as the delivery to him from the railroad, vested the property in him. Allowing the utmost extent that can be claimed for this agreement, that it was one to thus consign to Taylor *all* the grain which Trotter should buy, there would have been here but a breach of promise, as Trotter did not so consign this grain, except as to the surplus, above paying Turner [the owner of drafts drawn against the wheat]. Such an agreement would be one in relation to property to be afterward acquired, and could have no effect in giving the title to any such property until after it had come into the possession of Taylor. But before this wheat came into the possession of Taylor, the rights of Turner had attached, and when it came to Taylor, Trotter's only interest in it was his right thereto, subject to the pledge of the property he had made to Turner for the payment of the drafts, and Taylor received no greater interest. Delivery to a carrier is considered as a delivery to the consignee only, where and as it is in agreement with the terms and the intention of the shipment."

§ 520. A consignee to whom the consignor is indebted upon general account cannot appropriate the proceeds of a shipment to the payment of the general balance due him, as against a pledgee for value of a bill of exchange drawn against the goods, even when at the time of delivery of the goods he was not aware that the draft had been drawn.[1]

§ 521. The property acquired in the goods covered by a bill of lading by one to whom the latter is pledged as collateral security for the discount of the draft drawn against it, is, of course, a special property. His title, in other words, is conditional. In the case of a time draft, it is conditional upon the consignee's acceptance and by such acceptance it is divested. The title and the right of possession at once pass to the consignee and the former holder is left recourse only against the consignee as acceptor. The pledge is a pledge to secure acceptance and the title of the pledgee is, therefore, extinguished when the purpose of the pledge is thus fulfilled. Or

[1] Wilmerding *v.* Hart, Hill & Denio (Suppl.), 305.

it may be expressly stipulated that the bill of lading shall secure not only the acceptance, but the payment of the draft drawn against it. In such a case the pledgee's title would not be divested by acceptance, but would continue until the draft had been paid. In either case, however, the holder of the bill gains no absolute title to the goods. His title extends so far as to protect the advances he has made. If the terms of the pledge are broken by the consignee's failure or refusal to accept or pay, or by the vendor's failure to comply with the terms of his contract, in consequence of which the vendee refuses to accept the goods, the pledgee of the bill may receive the goods himself and sell them to reimburse himself.[1] His title is, however, in either case subject to be divested by performance of the one condition or the other.[2]

§ 522. So if the transaction be regarded as a mortgage of the goods rather than a pledge. Though it has been said that in such a case a general rather than a special property passes to the holder, yet that general property is subject to a defeasance by performance of the condition.[3]

The conditional character of the pledgee's title is not seriously questioned. The principle has rather been necessarily implied than expressly decided in the cases. A more mooted question is as to what the condition is, acceptance of the draft or its payment.

§ 523. A bill of lading attached to and forwarded with a time draft for the price of the goods covered by it, is, in the absence of special stipulations, a security for the acceptance of the draft rather than its payment. In The National Bank of Commerce *v.* Merchants' National Bank,[4] it was said by Mr. Justice STRONG,

[1] Welsh *v.* Gossler, 11 Abb., New Cases, 452; Cornwall *v.* Wilson, 1 Ves. 509; Allen *v.* Williams, 12 Pick. 301.

[2] Cayuga Bank *v.* Daniels, 47 N. Y. 631; Dows *v.* Exchange Bank, 1 Otto, 618; Bank of Rochester *v.* Jones, 4 N. Y. 497; Marine Bank *v.* Wright, 48 ib. 1; Allen *v.* Williams, 12 Pick. 297; First National Bank of Cairo *v.* Crocker, 111 Mass. 163.

[3] Bank of Rochester *v.* Jones, 4 N. Y. 497.

[4] National Bank of Commerce *v.* Merchants' National Bank, 1 Otto, 92; Lanflar *v.* Blossom, 1 La. Ann. Rep. 148; Wisconsin Ins. Co. *v.* The Bank, 21 Up. Can. Q. B. 284, affirmed 2 Up. Can. Error & Appeal Rep. 282; Shepherd *v.* Harrison, L. R. 4 Q. B. 493; Coventry *v.* Gladstone, L. R. 4 Eq. 493; Gurnly *v.* Behrend, 3 El. & Bl. 622.

in reply to the argument that the bill of lading was in such a case a contract collateral to the bill of exchange discounted and that when transferred it became a security for the principal obligation, namely, the contract evinced by the bill of exchange, "the argument assumes the very point to be proved. . . Payment of the drafts by the drawees was no part of the contract when the discounts were made. The bills of exchange were then incomplete. They needed acceptance. They were discounted in the expectation that they would be accepted, and that thus the bank would obtain additional promissors. The whole purpose of the transfers of the bills of lading to the bank may, therefore, well have been satisfied when the additional names were secured by acceptance and when the drafts thereby became completed bills of exchange. We have already seen that whether the drafts and accompanying bills of lading evidenced sales on credit or requests for advancements on the cotton consigned or bailments to be sold on the consignor's account, the drawees were entitled to the possession of the cotton before they could be required to accept, and that if they had declined to accept because possession was denied to them concurrently with their acceptance, the effect would have been to discharge the drawers and indorsers of the drafts. The demand of acceptance, coupled with a claim to retain the bills of lading would have been insufficient demand. Surely the purpose of putting the bills of lading into the hands of the bank was to secure the completion of the drafts by obtaining additional names upon them, and not to discharge the drawers and indorsers, leaving the bank only a resort to the cotton pledged."

§ 524. In a previous portion of the opinion in this case, it was remarked that the fact that a time draft is sent in the usual manner accompanied by a bill of lading indorsed in blank, clearly implies either that the goods were sold on credit to be paid for by the accepted draft or that the draft is a demand for an advance on the shipment or that the transaction is a consignment to be sold by the drawee on account of the shipper. If it is the first, the purchaser is certainly entitled to possession of the goods upon accepting the bill. "This would not be doubted, if, instead of an acceptance, he had given a promissory note for the goods, payable at the expiration of the stipulated credit.

In such a case it is clear that the vendor could not retain possession of the subject of the sale after receiving the note for the price. . . . But an acceptor of a bill of exchange stands in the same position as the maker of a promissory note." In the other alternative the consequence is the same. The acceptance is requested upon the credit of the consignment, not upon the credit of the drawer. If the security forwarded is not given, the acceptance cannot be required. If again the transaction be a consignment to be sold by the drawee on account of the shipper, the same considerations render it evident that there is no obligation upon the former to accept the draft without receiving the bill of lading. The court further said in this case, "The opinions we have suggested are supported by other very rational considerations. In the absence of special agreement, what is the consideration for acceptance of a time draft drawn against merchandise consigned? Is it the merchandise, or is it the promise of the consignor to deliver? If the latter, the consignor may be wholly irresponsible. If the bill of lading be to his order, he may, after the acceptance of the draft, indorse it to a stranger, and thus wholly withdraw the goods from any possibility of their ever coming to the hands of the acceptor. Is, then, the acceptance a mere purchase of the promise of the drawer? If so, why are the goods forwarded before the time designated for payment? They are as much after shipment under the control of the drawer as they were before. Why incur the expense of storage and of insurance? And if the draft with the goods or with the bill of lading be sent to a bank for collection as in the case before us, can it be incumbent upon the bank to take and maintain custody of the property sent during the interval between the acceptance and the time fixed for payment? Meanwhile, though it be a twelvemonth, and no matter what the fluctuations in the market value of the goods may be, are the goods to be withheld from sale or use? And who is to pay the warehouse charges? Certainly not the drawees. If they are to be paid by the vendor, or one who has succeeded to the place of the vendor by indorsement of the draft and bill of lading, he fails to obtain the price for which the goods were sold."

§ 525. Accordingly, a consignor's agent or a holder of the

bill who has become such by discounting the draft drawn against the consigned property, is bound to surrender the bill of lading to the consignee upon the latter's acceptance of the draft.[1] The fact that the draft has been sent to an agent "for collection" does not alter the rule.[2] The phrase is simply to rebut the inference from the indorsement that the agent is the owner of the draft. It is the duty of the agent to collect the amount of the draft, but that amount is not collectible until the draft is accepted. In surrendering the bill of lading to procure such acceptance, therefore, the agent is taking a step indispensable to the execution of his agency. It follows, of course, that in the absence of special instructions to the contrary, an agent so surrendering the bill cannot thereby render himself liable for negligence. Such an agent, in the language of the Supreme Court of the United States,[3] "cannot reasonably be required to know, without instruction, that the transaction is not what it purports to be."

§ 526. A holder of a bill, to whom it has been indorsed upon his discount of the draft drawn against it, has no greater right than an agent "for collection." This is so because he has no greater right than the shipper. The indorsement in such a case cannot alter the contract between the vendor and vendee and withdraw from the latter the right of possession to which he was entitled under it.[4]

§ 527. By virtue of an express agreement to that effect, a bill of lading may be made security for the payment of the draft rather than for its acceptance alone. One who purchases a draft drawn against a cargo and receives the bill of lading as expressly pledged to secure the payment of the draft, cannot be required to surrender the security upon the acceptance of the draft and rely solely upon the personal credit of the acceptors. While in such a case the reasons heretofore considered may ex-

[1] National Bank of Commerce *v.* Merchants' National Bank, 1 Otto, 92; Wisconsin Ins. Co. *v.* The Bank, 21 U. C. Q. B. 284; 2 U. C. Er. & App. Rep. 282.

[2] National Bank of Commerce *v.* Merchants' National Bank, 1 Otto, 92.

[3] National Bank of Commerce *v.* Merchants' National Bank, 1 Otto, 92.

[4] National Bank of Commerce *v.* Merchants' National Bank, 1 Otto, 92.

onerate the drawees from their obligation to accept, the express terms of the indorsee's contract with the drawers exonerates the former from any duty to deliver the bill of lading except upon payment. Consequently where the drawer thus confers upon his indorsee the power to withhold from the drawee the security without which the latter under his contract is not obliged to accept the bill, the drawer is not entitled to demand formal presentment of the bill of exchange for acceptance and notice of its non-acceptance.[1] The intention of the shipper that his agent shall hold a bill of lading until payment of the accompanying draft must of course be expressed clearly to the agent. For, as has been seen, the prevalent custom is to hold it only as security for acceptance. To hold it until the draft is not only accepted but paid, is "an exceptional course, adopted only in times of peril and suspicion."[2]

§ 528. It follows that a consignee of goods which the vendor has pledged to secure their price can entitle himself to possession of the goods only by payment or tender of the price, or by giving the specified obligation to pay the price at a future time. The appropriation under the contract of sale is, in the case of such a pledge, conditional and the pledgee's title remains paramount to that of the consignee until the conditions are performed.[3]

§ 529. The property in the goods vests in the consignee upon his acceptance or payment of the draft, where, at least, there has been a sale of the goods and not an absolute reservation by the vendor of the *jus disponendi*. Upon such an acceptance or payment, or tender thereof, the pledgee of the bill has no further right over the bill of lading or the goods. Where the vendor has made the bill deliverable to his own order, it has been held that the consignee can obtain no title, although he tenders his acceptance or payment of the draft,[4]

[1] Schuchardt *v.* Hall, 36 Md. 590.

[2] Gurney *v.* Behrend, 3 Ellis & Blackburn, 630.

[3] Alderman *v.* Eastern R. Co., 115 Mass. 233; Newcomb *v.* Boston & Lowell R. Co., ib. 230; Turner *v.* Trustees Liverpool Docks, 6 Ex. 543; Shepherd *v.* Harrison, L. R. 4 Q. B. 196; Ogg *v.* Shuter, L. R. 10 C. P. 159.

[4] Wait *v.* Baker, 2 Ex. 1; Ellershaw *v.* Magniac, 6 ib. 570; Gavarron *v.* Kreeft, L. R. 10 Ex. 274.

but where the bill of lading has been dealt with only to secure the contract price, the property vests in the consignee upon his payment or tender of the price. If thereupon the pledgee refuses to deliver the goods, the latter is liable to the consignee in damages for the non-delivery.[1]

§ 530. The pledgee's right to the goods, or to equivalent damages, is not divested by the consignee's obtaining possession of them from the carrier without accepting the draft. In such a case the pledgee may maintain an action against the consignee for the proceeds of the goods if he has sold them, as for moneys had and received.[2] If the consignee obtain the goods under a duplicate bill of lading inadvertently placed in his possession; or under an invoice which the carrier treats as sufficient authority; or in any other way save by the authority of the pledgee, he thereby obtains no title which will prevail against that of the latter, where delivery is by the terms of the contract, express or implied, made conditional upon his payment or acceptance of the draft. Thus where the consignee was sent an invoice of the shipment and, by presenting it to the captain of the vessel by which the goods were shipped, obtained possession and sent them to an auctioneer to be sold, without paying a draft drawn against him for the price, the pledgee of the bill of lading was held entitled to maintain trover against the auctioneer.[3]

§ 531. Where the consignee's possession has been obtained even through the pledgee's own delivery of the goods, the latter's title is not thereby destroyed or impaired where the bill of lading was delivered under an express stipulation that the goods, being pledged for the payment of the draft, are placed in the control of the consignee, or his agent in trust, to redeem the pledge. Where in such a case an agent of the consignee who has seen a copy of the pledgee's indorsement of the

[1] Mirabita *v.* Imperial Ottoman Bank, 3 Ex. D. 164; 38 Law Times R. (N. S.) 597.

[2] Indiana Nat. Bank *v.* Colgate, 4 Daly, 41; People's Bank *v.* Stewart, 3 P. & B. (New Brunswick) 268; Millar *v.* Saving Ass'n, 3 Weekly Notes, 480; Wilmerding *v.* Hart, Hill & Denio (Suppl.), 305; Hoare *v.* Dresser, 5 Jurist (N. S.), 371.

[3] People's Bank *v.* Stewart, 3 P. & B. (New Brunswick) 268.

bill of lading, creating such a trust of the goods, delivers the latter to the consignee's vendee, to whom such agent has made advances for the purchase, the agent is liable to the pledgee for conversion.[1]

[1] Farmers & Mechanics' Bank *v.* Hazeltine, 78 N. Y. 104.

CHAPTER XXXVII.

THE BILL-HOLDER'S TITLE AND THE RIGHT OF STOPPAGE IN TRANSITU.

The right in general, § 532.
The right is defeated by a transfer of the bill of lading for value to a *bona fide* transferree, § 533.
The bill-holder's title is not necessarily invalidated by the fraud of the original vendee, § 534.
The bill must have been obtained in faith of an apparent title, § 535.
Right of stoppage is not defeated where the transfer is fraudulent, § 536.
Transferree's knowledge of the vendee's insolvency, or that the goods were not paid for, § 537.
The consideration for the transfer—What bill-holders may defeat the right of stoppage, § 538.
The same. Antecedent debts, § 539.
The same. Contemporaneousness of the transfer and payment of consideration, §§ 540, 541.
The same. Transfer as collateral for an antecedent debt, § 542.
The same. Forbearance to sue, etc., § 543.
The bill-holder has only such an interest as will protect his advances. Consignor's right to the surplus, § 544.
The same. Sub-sales—sale of goods "to arrive," etc., § 545.
The same. Additional securities of the vendee must be first appropriated to the pledgee's claim, § 546.
The right of stoppage is not defeated, unless the bill is transferred, § 547.
Notice of stoppage to the carrier after the vendee's transfer of the bill, § 548.

§ 532. The most important of all the consignor's rights is that of stoppage *in transitu*, namely, the right of an unpaid vendor, in the case of his vendee's insolvency, to stop the goods while in the course of transportation to the latter. The origin of this right, whether derived or developed from the principles of equity, from analogies in the common law, or from the growth of pure mercantile custom,[1] its character and effect, whether a rescission of the contract of sale or the establishment of a lien and the multitudinous phases of the question in its various applications, are not within the scope of the present dis-

[1] See Lord Abinger in Gibson *v.* Carruthers, 8 M. & W. 337; Wiseman *v.* Vandeputt, 2 Vernon, 202; Burghall *v.* Howard, 1 H. Bl. 366, n.

cussion,[1] save as the exercise of the right may be affected by the issue and negotiation of bills of lading for the goods shipped. In discussing the latter, it must be remembered that the right amounts in substance to an extension by the law merchant of the lien for price which a vendor has before delivery. It is a lien of a peculiar character, in that its existence is not dependent, like that of ordinary liens for price, upon the co-existence of the right and fact of possession and is not lost with the loss of either. In the case of a sale of goods upon credit, the right of possession and the right of property are immediately transferred to the vendee. Both rights are qualified and are defeasible by his insolvency before possession is obtained. To the vendee belongs the right of property. Upon him must fall the loss incurred in any accident in the transit and in him is the right to claim possession upon tender of the price. Until the latter is made, the vendor's right to resume possession is retained and may be asserted.

§ 533. Although the law has thus adjusted the respective rights of the principals in the transaction, it frequently happens that equities are created in favor of third parties, which are superior to that of the vendor. Such an equity is most frequently raised by the negotiation of the bills of lading for the goods shipped. The cardinal proposition relative to this modification of the principle is that the right to stop *in transitu* may be defeated by a transfer of the bill of lading for value to a *bona fide* indorsee. The leading case in its establishment is that of Lickbarrow *v.* Mason,[2] decided in the House of Lords in 1793. In that case the consignors of a cargo sent two bills of lading therefor to the consignee, indorsed in blank,—another bill being retained by them and a fourth by the master of the vessel. Bills of exchange for the price were afterward drawn by the consignors upon the consignee and by him accepted. The consignee sent to the plaintiffs, before the arrival of the cargo, the two bills of lading, together with the invoice, which he had received from the consignors, in order that the plaintiffs

[1] See a general discussion of the subject in Benjamin on Sales, Book V., Part I., c. v.

[2] 2 T. R. 63; 1 H. Bl. 357; 6 East, 21.

might obtain possession of the goods and sell them on his account. The consignee drew bills of exchange upon the plaintiffs for the price, which were paid. Afterward, before the arrival of the goods and before the bills of exchange, drawn by the consignors upon the consignee, fell due, the latter became bankrupt. The bills were duly protested and were afterward taken up by the consignors. Upon learning of the consignee's bankruptcy, the consignors indorsed to the defendants the bill of lading which they had retained and transmitted it to them, with authority to obtain possession of the goods for and on account of the consignors. Upon the arrival of the cargo, the plaintiffs presented their bill of lading to the master of the vessel and obtained from him possession of the goods. The plaintiffs, tendering freight and charges, demanded the goods from the defendants and, upon refusal of the demand, brought trover. The general right to stop *in transitu* in such cases was conceded by all the judges before whom successively the case was argued, but in the House of Lords it was distinctly ruled, in affirmance of the judgment which had been reversed by the Exchequer, that if the consignee of goods in transit assign for a valuable consideration to an innocent third party the bills of lading, the consignor's right as against such assignee is lost. Mr. Justice Buller, in delivering the judgment of the Lords, adopted the principle enunciated in Lempriere *v.* Pasley,[1] in 1788, that as between a person who has an equitable lien and a third person who purchases a thing for a valuable consideration and without notice, the prior equitable lien must give way to the title of the vendee. "This is founded on plain and obvious reason; for he who has bought a thing for a fair and valuable consideration, and without notice of any right or claim by any other person, instead of having equity against him, has equity in his favor; and, if he have law and equity both with him, he cannot be beat by a man who has equal equity only." It was laid down, moreover, following a previous judgment of the Lords, in the case of Kinlock *v.* Craig,[2] that the right of stoppage *in transitu* never arises except as between vendor and vendee and that a

[1] 2 Term R. 485.

[2] 3 ib. 787.

bona fide indorsee of a bill of lading from the consignee of the goods could not be considered the vendee of the consignor.

The principle of the case of Lickbarrow *v.* Mason is accepted as the law in both England and America.[1]

§ 534. The title of the *bona fide* indorsee under his bill of lading is not necessarily invalidated by the fact that the transaction between the vendor and the original vendee is tainted with fraud on the part of the latter. The law prefers the title of a *bona fide* purchaser for value from a fraudulent vendee to that of the original owner.[2] The rule, as stated in Keyser *v.* Harbeck[3], is that where there has been a contract of sale and a delivery under it sufficient in law to vest the property in the first purchaser and make a good title if not tainted with fraud, the *bona fide* vendee of such a purchaser, buying and obtaining possession before the contract has been rescinded, will acquire a perfect title as against the first vendor. Such a sale being not void, but voidable, the vendor may reclaim his goods from the vendee, but not from a *bona fide* purchaser from the latter without notice of the fraud.

§ 535. The title of the purchaser from the original vendee must, however, have been obtained not only without notice of the fraud and for value, but upon the faith of an apparent title such as is incident to the possession of the bill of lading.[4] The title of a *bona fide* purchaser from a fraudulent vendee will be

[1] Gurney *v.* Behrend, 3 E. & B. 622; Kemp *v.* Falk, L. R. 7 App. C. 573; *In re* Westzinthus, 5 B. & Ad. 817; Spalding *v.* Ruding, 6 Bear. 376; Conard *v.* Atlantic Insurance Co., 1 Peters, 386; Becker *v.* Hallgarten, 86 N. Y. 167; Warren *v.* Sproule, 2 Marsh, 528; Dows *v.* Greene, 32 Barb. 490; Lee *v.* Kimball, 45 Me. 172; Schumacher *v.* Eby, 24 Pa. St. 521; Rosenthal *v.* Dessan, 11 Hun, 49; Dows *v.* Perrin, 16 N. Y. 325; Relyea *v.* N. H. Rolling Mill Co., 42 Conn. 579; Newhall *v.* C. P. R. R., 51 Cal. 345; Schmidt *v.* Steamship Penna., 7 W. N. C. (Pa.) 98; Curry *v.* Roulstone, 2 Overt. 111; Audenreid *v.* Randall, 3 Cliff, 99; The Mary Ann Guest, 1 Blatchf. 358; Chandler *v.* Fulton, 10 Texas, 2; First Nat. Bank of Memphis *v.* Pettit, 9 Heisk. 447; Halliday *v.* Hamilton, 11 Wall. 560; Allen *v.* Me. Cent. R. Co., 79 Me. 327.

[2] Dows *v.* Rush, 28 Barb. 157; Parker *v.* Patrick, 5 T. R. 175; White *v.* Gardner, 5 Law & Eq. R. 379; Keyser *v.* Harbeck, 3 Duer, 391; Rowley *v.* Bigelow, 12 Pick. 307; Dows *v.* Greene, 32 Barb. 490.

[3] 3 Duer, 373.

[4] Barnard *v.* Campbell, 58 N. Y. 73; 55 ib. 456.

preferred to that of a *bona fide* vendor only when the purchaser has not only parted with value, but has done so upon the credit of possession, or constructive possession, in the vendee, received from the vendor and by means of which the latter has in legal contemplation induced the second purchaser to treat the first as owner. Unless the vendor has thus vested his vendee with an apparent ownership, the principle of estoppel which lies at the base of the rule under consideration, lacks one of its essential elements.

§ 536. The right of stoppage *in transitu* cannot, however, be defeated by an apparent sale or transfer of the bill of lading, fraudulently made for the very purpose of defeating the right. To prevent the exercise of the right there must be a transfer for value and without fraud.[1] Where in an action to enforce an alleged stoppage *in transitu* a consignee defends upon the ground that he had received the goods into his possession and sold them and assigned the bill of lading therefor to a third party, the plaintiff may show that the sale and assignment were fraudulent in a supplemental complaint.

§ 537. Proof that the assignee of the bill of lading from the original vendee had knowledge at the time of the transfer of the bill, of the vendee's insolvency, is admissible in a contest with the vendor, to show that the bill was not taken in good faith.[2] It has been held, that where there is no collusion and the transferee has no notice of any other circumstance which ought in fairness to have prevented his taking the bill, his knowledge that the goods had not been paid for in money does not render the transfer to him invalid.[3] Knowledge of the fact that the particular goods in transit had not been paid for would seem to be far weaker evidence of bad faith on the part of the assignee than knowledge of the vendee's insolvency, yet the rule has been considered, perhaps justly, open to criticism. For, as was said in Holbrook *v.* Vose,[4] "where

[1] Rosenthal *v.* Dessau, 11 Hun, 49.

[2] Loeb *v.* Peters, 63 Ala. 243; Stanton *v.* Eager, 16 Pick. 476; Ilsley *v.* Stubbs, 9 Mass. 65; Seymour *v.* Newton, 105 ib. 275; Kitchener *v.* Spear, 30 Vt. 545; Covell *v.* Hitchcock, 23 Wend. 611; Vertue *v.* Jewell, 4 Camp. 31.

[3] Canning *v.* Brown, 9 East, 509; Salomons *v.* Nissen, 2 T. R. 681.

[4] 6 Bosw. 76.

there has been no delivery of the goods, and the transferree acts upon the faith of the bill of lading, he necessarily knows that the goods are in transit, and that if not paid for, they are subject to the vendor's right to stop them if the vendee becomes insolvent. It would not therefore be inequitable to hold that with such knowledge and knowledge also that the goods have not been paid for, he makes his advances subject to the vendor's right and does so voluntarily, with knowledge of all the facts."

Since, however, it cannot be laid down as a general rule that a third party may not honestly take an assignment of a bill of lading, although he may know that the goods have not been paid for, the better rule is that such an assignment is valid unless the assignee takes it, having notice of facts which make the assignment unfair or dishonest.[1]

§ 538. In order to give to such negotiation of the bill of lading for goods in transit the effect of destroying or limiting the vendor's right to stop them, it is not necessary that the transaction between the bill-holder and the original vendee should have been an ordinary purchase and sale. One who makes a temporary advance to the vendee, taking the bill of lading as his security, or one who by any similar transaction becomes a technical purchaser for value, is entitled to the same rights as a simple buyer of the goods.[2]

§ 539. The fact that the consideration for the transfer of the bill may have been the payment of an antecedent debt does not prevent the transferree from destroying the consignor's right to stop the goods. The law was so laid down in England, in Leask *v.* Scott,[3] in which the court refused to follow a preceding decision to the contrary effect and said that there was "not a trace of such distinction between cases of past and present consideration to be found in the books."

§ 540. *A fortiori* effect of the transfer is not impaired by the

[1] Canning *v.* Brown, 9 East, 409; Salomons *v.* Nissen, 2 T. R. 681.

[2] Becker *v.* Hallgarten, 86 N. Y. 167; Dows *v.* Rush, 28 Barb. 157; Dows *v.* Greene, 24 N. Y. 638; Blossom *v.* Champion, 28 Barb. 217.

[3] Leask *v.* Scott, L. R. 2 Q. B. Div. 376, dissenting from Rodger *v.* The Comptoir d'Escompte de Paris, L. R. 2 P. C. 393; Lee *v.* Kimball, 45 Me. 172.

fact that the consideration for the sale of the goods is actually advanced before the delivery of the bill of lading,[1] where, although the goods are actually in the hands of the purchaser or lender, the bill of lading has been promised and is a part of the consideration on which the money or other consideration was advanced. It has been held, that in order to defeat a defrauded vendor's right to reclaim his goods, the purchaser from the fraudulent vendee must have taken his title upon the faith of such a title in the vendee as is evinced by possession of a bill of lading.[2] In Barnard *v.* Campbell,[2] one Jeffries contracted, through his broker, to sell to the defendants 1800 bags of linseed. Upon the day when the contract was made the defendants, in pursuance thereof, mailed to Jeffries their notes for the price, which were received by him and immediately pledged as collateral for a loan. On the day of the contract Jeffries contracted to purchase of the plaintiffs 1800 bags and a few days later the latter, upon the fraudulent representations of Jeffries, caused to be delivered to him 1370 bags which he shipped to the defendants in part fulfilment of his contract with them, forwarding to them a bill of lading of the goods deliverable to them. On the arrival of the goods the plaintiffs demanded them. Their claim was sustained by the court, upon the ground that a *bona fide* purchaser for value will not be given preference over an unpaid vendor, unless he has purchased upon the faith of the apparent title of the fraudulent vendee and his right to dispose of the property. Notwithstanding the fact that the court in this case expressed itself strongly in opposition to the rule that an antecedent debt is a valuable consideration for a transfer of the bill, as that rule had in some of the cases been applied, yet the decision can be regarded as going no further than to affirm the principle first mentioned.

§ 541. This case and Becker *v.* Hallgarten[3] clearly mark the distinction between a sale of any goods of a specified kind, where value is advanced independently by the purchaser, with no contemplation of receiving a particular bill of lading as security, the transfer of the latter being a distinctly subsequent trans-

[1] Becker *v.* Hallgarten, 86 N. Y. 167.

[2] 58 N. Y. 73.

[3] 86 N. Y. 167.

action intended to shift the loss incurred by the fraud of the original vendee, at the pleasure of the latter and, on the other hand, a purchase of, or advance upon, particular goods on the faith of an apparent title to them in the original vendee conferred by the original owner. In the latter case, no matter what the mode in which the apparent title to the goods is created, the production of an additional *indicium* of ownership, in the shape of a bill of lading, is unnecessary and its transfer being no more than an incident of the purchase may be made subsequently.

§ 542. The transfer of a bill of lading by the purchaser of the goods as mere collateral security for an antecedent debt, without any new consideration, does not, however, constitute the transferree a purchaser for value.[1] The transfer may operate to defeat the right of stoppage when it is intended as the payment of an antecedent debt,[2] but it cannot have such effect when made merely as collateral security where the transfer is not made as an absolute satisfaction of a past debt, the advances for which the transferree claims must have been made on the faith of the bill of lading; or, on the faith of such an apparent title as might be evinced by a bill of lading. The statement that the advance of the money or value and the indorsement of the bill must be exactly contemporaneous acts, is not borne out by the decisions, but the latter clearly show that the payment of the money and the assignment of the bill must be so nearly contemporaneous as to leave no doubt of their constituting a single transaction. Although it was said in Holbrook *v.* Vose[3] that an advance on a promise by the borrower to procure and deliver bills of lading is not an advance on the faith of the bills, the language of the court must be limited in its application to the particular facts of the case, in which it appeared in evidence that the transferrees had no intention of claiming the slightest control over the goods, but expected and intended that they should continue to their destination and be used by the vendee for the purpose for which he had purchased them; that they fully expected reimbursement from

[1] Loeb *v.* Peters, 63 Ala. 243; Holbrook *v.* Vose, 6 Bosw. 76.

[2] Lee *v.* Kimball, 45 Me. 172.

[3] Barnard *v.* Campbell, 58 N. Y. 73.

the vendee for their advance and expected it in the form of payment of the vendee's notes, which they held as their principal security. Where, however, it is clear that according to the intention of both the original vendee and the lender the advance is made upon the security of the goods and, by the express or clearly implied terms of the contract, the latter are placed within the lender's control, a mere delay for a short time in delivering to the latter the muniment of title to them cannot change the transaction into an assignment of collateral security.[1]

§ 543. The satisfaction of a past debt being a valuable consideration sufficient to support the assignee's title against a stoppage, it follows *a fortiori* that a creditor's forbearance to bring suit or his release of the vendee from an obligation to deposit with him further securities, must be given the same effect.[2]

§ 544. It is an important modification of the principle of Lickbarrow *v.* Mason,[3] however, that the right of stoppage *in transitu* is not discharged absolutely by a *bona fide* pledge for value of the bill of lading, but that it continues in the vendor as at least an equitable right, subject only to a charge in favor of the indorsee of the bill and, such charge being paid off, the vendor, having claimed the right of stoppage, will be held entitled to the surplus of the goods or their proceeds. The right of stoppage is a right to stop the goods and not to defeat some imaginary interest of the vendee. It cannot be asserted against a pledgee who has advanced value upon the faith of the bill, since he has a substantial interest in both law and equity. The preservation of his rights cannot however operate to secure for the original vendee or his creditors, liens upon the goods which the vendor's exercised right of stoppage would, in the absence of such pledge, have unquestionably prevented.[4] The consignee's transfer of the goods for the limited purpose of se-

[1] Durbrow *v.* McDonald, 5 Bosw. 130; Becker *v.* Hallgarten, 86 N. Y. 167.

[2] Chartered Bank *v.* Henderson, L. R. 5 P. C. 501.

[3] 2 T. R. 63; 1 H. Bl. 357, 6 East, 21.

[4] Spalding *v.* Ruding, 6 Beav. 376; *In re* Westzinthus, 5 B. & Ad. 817; Kemp *v.* Falk, L. R. 7 App. C. 573; *Ex parte* Davis, L. R. 13 Ch. Div. 628; Coventry *v.* Gladstone, L. R. 6 Eq. 44; Chandler *v.* Fulton, 10 Tex. 2.

curing a *bona fide* advance upon them, will not be permitted in equity to serve other purposes conflicting with the rights of the consignor. The law was so stated in Spalding *v.* Ruding,[1] where a bill of lading for goods of the value of £1800 was assigned to secure an advance upon them of £1000. The consignee having become bankrupt, the holder of the bill claimed as the consignee's factor to be entitled to apply the proceeds of the goods not only to the payment of the £1000, but also in satisfaction of the balance of a general account due him from the consignee, as against the consignor's right to stop the goods. It was held that he was entitled to no more than the £1000 and that although the legal right to the goods was transferred with the bill of lading, equity would regard the transfer as a pledge or mortgage only,—the attempted stoppage giving to the consignor an equitable right to the goods, subject only to the bill-holder's lien for his advance.

§ 545. The same principle is well illustrated in the case of Kemp *v.* Falk,[2] in which, after the consignee's indorsement of the bill of lading to a bank to secure an advance and while the goods were still in transit, the consignees sold the goods "to arrive" to sub-purchasers. Before delivery to the sub-purchasers the vendor gave notice to the carrier to stop the goods,—the original vendee having become bankrupt. The consignee remitted the proceeds of the sub-sales to the bank, after the payment of the advance, of which the balance was held to belong to the vendor. An attempt to distinguish the case from Spalding *v.* Ruding[3] and *In re* Westzinthus,[4] on the ground of the original purchaser's sale of the goods "to arrive," without any document of title, after the transfer of the the bill, was unsuccessfully made, the court holding that the indorsement of the bill of lading to the bank could confer no title whatever to the other purchasers, to whom the consignee could transfer only such rights as he himself possessed and a right, therefore, which was subject to the paramount right of the unpaid vendor.

§ 546. It is a necessary corollary of the principle under dis-

[1] 6 Beavan, 376.
[2] L. R. 7 App. C. 573.
[3] 6 Beavan, 376.
[4] 5 B. & Ad. 817.

cussion that where the party making advances to the vendee receives as security therefor, together with the goods described in the bill of lading, other goods belonging to the vendee, the vendor is entitled to compel the appropriation of all the vendee's own goods to the satisfaction of the pledgee's claim before any of those covered by the bill are so appropriated.[1]

§ 547. It follows that to give effect to the indorsement of a bill of lading it must also be delivered; that where there is no transfer of the bill the vendor's right of stoppage is not defeated. Although during the transit there has been a *bona fide* purchase of the goods and the bill of lading has been made out in the name of the sub-purchasers but not transferred to them, the unpaid vendor may so exercise his right of stoppage as to intercept the money due from the sub-purchasers.[2]

§ 548. Newhall *v.* Central Pacific Railroad Company[3] appears to be the only case in which the question arose as to whether the *bona fide* indorsee for value of the bill of lading would be protected where notice of the stoppage had been given to the carrier before the advance was made and the indorsement received. This case held that he would be so protected. After remarking that counsel had failed to produce a single adjudicated case in which the precise question had been decided or discussed and after reviewing the principles applicable in the ordinary case where assignment of the bill is made before notice of stoppage, Mr. Justice CROCKETT continued: "Precisely the same principles, in my opinion, are applicable when assignment is made after the carrier is notified by the vendor. Notwithstanding the notice to the carrier, the vendor's lien continues to be only a secret trust to a person who takes an assignment of a bill of lading without notice, etc. The law provides no method by which third persons are to be affected with constructive notice of acts transpiring between the vendor and carrier and in dealing with the vendee whom the vendor has invested with the legal title and apparent ownership of the goods, a stranger, advancing his money upon the strength of this apparently good

[1] *In re* Westzinthus, 5 B. & Ad. 817; Spalding *v.* Ruding, 6 Beav. 376; Kemp *v.* Falk, L. R. 7 App. Cas. 573.

[2] *Ex parte* Golding Davis, L. R. 13 Ch. 628. See also Lord Blackburn, in Kemp *v.* Falk, 7 App. Cas. 582.

[3] 51 Cal. 345.

title, is not bound at his peril to ascertain whether possibly the vendor may not have notified the carrier—it may be on some remote portion of the route—that the goods are stopped *in transitu.*"

While the soundness of this decision has been doubted, yet it is based upon the principle which prefers the rights of transferrees and indorsees (when all the circumstances of the transfer are contemporaneous and form but one transaction based upon the bill then in the possession of the original vendee), where the transfer of the bill is actually made for a valuable consideration and in good faith, upon the strength of the title to the possession of the goods which is evinced by the actual possession of the bill of lading by the original vendee.

CHAPTER XXXVIII.

THE UNIFORM BILL OF LADING—ITS GROWTH AND ADOPTION.

The growth of the Uniform Bill, § 549.
The originators of the Uniform Bill, §§ 550, 551.
The benefits resulting from a uniform bill, § 552.
Form of the Uniform Bill, § 553.

§ 549. The growth of the bill of lading in importance has been rapid. Its development has been varied. Each railroad, transportation company, or water carrier has from time to time adopted a form of bill of lading of its own. The character of the service performed by the various carriers gave a greater importance to some one or more limitations or conditions of the bill than that performed by others. Thus a large number of forms came into use and many difficulties, involving the carriers not only but the shippers as well, have continually arisen by reason of the variation in the forms.

§ 550. A number of years ago it became apparent to the large carrying companies that great good would be accomplished by the adoption of a uniform bill of lading for use throughout the United States. The work of preparing such a bill which would meet all the requirements of the various companies was begun. It was a difficult task and within the years 1889 and 1890 the result of the labor first began to be felt. In June, 1890, a circular was issued by the Chairman and Vice-Chairman of the Joint Committee of the Trunk Line and The Central Traffic Association, in which notice was given of the adoption of a uniform bill of lading by the carriers constituting these associations, to be put in force July 1, 1890. This bill was designed for use on either rail or water lines, or on lines including both rail and water service. Such a bill was regarded as necessary inasmuch as rail carriers receive much property for transportation to places accessible only by a river, lake, or ocean movement on some part of the through route.

§ 551. The carriers represented in the Trunk Line Association, the Central Traffic Association, the Southern Railway and Steamship Association, the Coast Steamship Association and Associated Lake and Rail Lines, united in appointing committees to serve on a permanent committee on uniform bills of lading. This permanent committee now has referred to it all questions respecting bills of lading and auxiliary forms and in the first instance recommends the action to be taken in regard thereto by the carrying companies.

§ 552. It need hardly be said that good will be accomplished by the universal adoption of one form of bill of lading. The shipper need not scrutinize the various and innumerable conditions at the time of each shipment in order to protect himself against the imposition of any improper condition or limitation of liability. The carrier accepting through shipments will know the terms of the contract of carriage without, in each case, being compelled to ascertain the form used by the particular company issuing the original bill. The consignee on being informed that he is to receive a bill of lading will know what his rights thereunder are and last, but far from least, the lender of money on the faith of bills of lading will be able to make his advances upon a better security and with a well-founded confidence that the instrument contains only those terms which are ordinary and usual.

§ 553. It has been deemed wise to insert in the text the following copy of what is now known as

THE UNIFORM BILL OF LADING.

Received 189 from

By the Company, the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned, and destined as indicated below, which said company agrees to carry to the said destination, if on its road, or its portion of the through route, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, in consideration of the rate of freight hereinafter named, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions, whether printed or written, herein contained, and which are hereby agreed to by the shipper and by him accepted for himself and his assigns as just and reasonable.

CONDITIONS.

1. No carrier or party in possession of all or any of the property therein described, shall be liable for any loss thereof or damage thereto, by causes beyond its control; or by floods or by fire from any cause or wheresoever occurring; or by riots, strikes, or stoppage of labor; or by leakage, breakage, chafing, loss in weight, changes in weather, heat, frost, wet, or decay; or from any cause if it be necessary or is usual to carry such property upon open cars.

2. No carrier is bound to carry said property by any particular train or vessel, or in time for any particular market, or otherwise than with as reasonable despatch as its general business will permit. Every carrier shall have the right, in case of necessity, to forward said property by any railroad or route between the point of shipment and the point to which the rate is given.

3. No carrier shall be liable for loss or damage not occurring on its own road or its portion of the through route, nor after said property is ready for delivery to the next carrier or to consignee. The amount of any loss or damage for which any carrier becomes liable shall be computed at the value of the property at the place and time of shipment under this bill of lading, unless a lower value has been agreed upon or is determined by the classification upon which the rate is based, in either of which events such lower value shall be the maximum price to govern such computation. Claims for loss or damage must be made in writing to the agent at point of delivery promptly after arrival of the property, and if delayed for more than thirty days after the delivery of the property, or after due time for the delivery thereof, no carrier hereunder shall be liable in any event.

4. All property shall be subject to necessary cooperage or baling at owner's cost. Each carrier over whose route cotton is to be carried hereunder shall have the privilege, at its own cost, of compressing the same for greater convenience in handling and forwarding, and shall not be held responsible for unavoidable delays in procuring such compression. Grain in bulk consigned to a point where there is an elevator may (unless otherwise expressly noted herein, and then if it is not promptly unloaded) be there delivered, and placed with other grain of same kind, without respect to ownership, and if so delivered shall be subject to a lien for elevator charges in addition to all other charges hereunder. No carrier shall be liable for differences in weights or for shrinkage of any grain or seed carried in bulk.

5. Property not removed by the person or party entitled to receive it within twenty-four hours after its arrival at destination, may be kept in the car, depot, or place of delivery of the carrier, at the sole risk of the owner of said property, or may be, at the option of the carrier, removed and otherwise stored at the owner's risk and cost, and there held subject to lien for all freight and other charges. The delivering carrier may make a reasonable charge per day for the detention of any car and for use of track after the car has been held forty-eight

hours for unloading, and may add such charge to all other charges hereunder, and hold said property subject to a lien therefor. Property destined to or taken from a station at which there is no regularly appointed agent, shall be entirely at risk of owner when unloaded from cars, or until loaded into cars; and when received from or delivered on private or other sidings, shall be at owner's risk until the cars are attached to, and after they are detached from, trains.

6. No carrier hereunder will carry, or be liable in any way for, any documents, specie, or for any article of extraordinary value not specifically rated in the published classifications, unless a special agreement to do so, and a stipulated value of the articles, are indorsed hereon.

7. Every party, whether principal or agent, shipping inflammable, explosive, or dangerous goods, without previous full written disclosure to the carrier of their nature, shall be liable for all loss or damage caused thereby, and such goods may be warehoused at owner's risk and expense or destroyed without compensation.

8. Any alteration, addition, or erasure in this bill of lading which shall be made without the special notation hereon of the agent of the carrier issuing this bill of lading shall be void.

9. If the word "order" is written hereon immediately before or after the name of the party to whose order the property is consigned, without any condition or limitation other than the name of a party to be notified of the arrival of the property, the surrender of this bill of lading properly indorsed shall be required before the delivery of the property at destination. If any other than the aforesaid form of consignment is used herein, the said property may, at the option of the carrier, be delivered without requiring the production or surrender of this bill of lading.

10. Owner or consignee shall pay freight at the rate below stated, and all other charges accruing on said property, before delivery, and according to weights as ascertained by any carrier hereunder; and if upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped, and at the rates and under the rules provided for by published classifications.

11. If all or any part of said property is carried by water over any part of said route, such water carriage shall be performed subject to the conditions, whether printed or written, contained in this bill of lading, including the condition that no carrier or party shall be liable for any loss or damage resulting from the perils of the lakes, sea, or other waters; or from explosion, bursting of boilers, breakage of shafts, or any latent defect in hull, machinery, or appurtenances; or from collision, stranding, or other accidents of navigation; or from the prolongation of the voyage. And any vessel carrying any or all of the property herein described shall have liberty to call at intermediate ports; to tow and be towed, and to assist vessels in distress, and to deviate for the purpose of saving life or property. And any carrier by water liable on account

of loss of or damage to any of said property shall have the full benefit of any insurance that may have been effected upon or on account of said property.

Upon all the conditions, whether printed or written, herein contained, it is mutually agreed that the rate of freight from to is to be—

In Cents Per 100 Lbs.							If Special.		
If — times, first class.	If first class.	If second class.	If third class.	If fourth class.	If fifth class.	If sixth class.	Article.	Rate.	Per

And advanced charges at $ ꝺꝺ

Marks, Consignees and Destination.	Description of Articles.	Weight. Subject to Correction.

Agent.

Per

ADDENDA.

LEGISLATION OF THE DIFFERENT STATES AFFECTING BILLS OF LADING.

ALABAMA.

[Civil Code of Alabama, 1886, page 306.]

§ 1174. *Warehousemen or common carriers to give receipt or bill of lading; if given for cotton, must state condition of bagging, ropes or ties.*—Warehousemen or common carriers receiving things or property of any kind for safe-keeping, or for carriage, for hire or reward, must, on the delivery to them of such things or property, give the person from whom received a bill of lading, stating the order or condition in which such things or property may be, and if cotton in bales is received, state expressly the condition of the bagging, ropes, or ties; and such warehouseman or common carrier is bound to deliver in like order and condition as when received; and if such receipt or bill of lading be not given, such things or property must be deemed and taken to have been in good order or condition at the time of delivery to such warehouseman or carrier, and he is bound to delivery in like good order and condition; and the warehouseman or carrier, neglecting or failing to give such receipt or bill of lading, is liable for all loss or damages the owner of such things or property may sustain in consequence of such neglect or failure; but nothing in this section contained must be construed as affecting the common law liability of a warehouseman or of a common carrier for an injury to, or for the loss of such things or property.

§ 1175. *Receipt of bill of lading; when not to be given.*—A warehouseman, common carrier, or a wharfinger, or other person engaged in the business of storage, carriage, or of keeping for shipment, or of forwarding things or property, must not give a receipt or bill of lading for the things or property for storage, for carriage, or for keeping for shipment, or for forwarding, unless such things or pro-

perty have been actually delivered to him, or placed under his control; and a second receipt or bill of lading must not be issued or given, the original being outstanding, without writing across the face thereof the word "duplicate."

§ 1176. (Which is § 5 of Act of 12th December, 1884). *Delivery to cotton compress.*—A delivery of cotton at or to a compress for the purpose of being compressed, at the instance, or in the usual course of business of a warehouseman, common carrier, wharfinger or other person engaged in the business of storage, or of carriage, or of keeping for shipment, or of forwarding, may be taken and deemed as an actual delivery to such warehouseman, carrier, wharfinger, or other person, and therefor a receipt or bill of lading may be issued or given.

§ 1177. (Which is Act of February 21st, 1881, p. 33, Sect. 4.) *Sale, etc., by warehouseman, carrier or wharfinger.*—A warehouseman, common carrier, wharfinger, or other person engaged in the business of storage, carriage, or of keeping for shipment, or of forwarding things or property, must not otherwise than is authorized by law, or by the contract of delivery to them, make sale of things or property entrusted to them; nor, without the assent in writing of the person to whom they may have given a receipt or bill of lading, or of the legal holder of such receipt or bill of lading, incumber or transfer the same; nor must they, otherwise than as may be authorized by the contract of delivery to them, part with the control or possession of such things or property, without the assent in writing of the person to whom they may have given a receipt or bill of lading, or of the legal holder of such receipt or bill of lading.

§ 1179. *False or second receipts, or delivery without cancellation or indorsement of partial delivery.*—If any common carrier, not having received things, or property for carriage, shall give or issue a bill of lading, or receipt, as if such things or property had been received, or any warehouseman, or wharfinger, or person engaged in the business of storage, or keeping for shipment, or forwarding, shall issue a receipt for things or property, not having received them; or if any of such parties shall give or issue a second bill of lading, or receipt, the original being outstanding, not expressing in such second bill of lading, or receipt, that it is a duplicate, or shall surrender such things or property without receiving and cancelling the bill of lading or receipt issued therefor, or make partial delivery without indorsing such partial delivery on such bill of lading or receipt, except as provided in Section 1178, such carrier, warehouseman, wharfinger, or person is liable to any person injured thereby for all damages, immediate or consequential, therefrom resulting.

ARIZONA.

[Revised Statutes, 1887, page 743, §§ 900—903.]

§ 900. *Issuing fictitious bill.*—Every person, being the master, owner, or agent of any vessel, or officer or agent of any railroad, express or transportation company, otherwise being or representing any carrier, who delivers any bill of lading, receipt, or other voucher, by which it appears that any merchandise of any description has been shipped on board any vessel or delivered to any railroad, express or transportation company, or other carrier, unless the same has been so shipped or delivered, and it is at the time actually under the control of such carrier, or the master, owner or agent of such vessel, or of some officer or agent of such company, to be forwarded as expressed in such bill of lading, receipt or voucher, is punishable by imprisonment in the territorial prison not exceeding five years, or by a fine not exceeding one thousand dollars, or both.

§ 901. *Issuing bill when goods are not upon premises.*—Every person carrying on the business of a warehouseman, wharfinger, or other depositary of property, who issues any receipt, bill of lading, or other voucher for any merchandise of any description, which has not been actually received upon the premises of such person, and is not under his actual control at the time of issuing such instrument, whether such instrument is issued to a person as being the owner of such merchandise, or as security for any indebtedness, is punishable by imprisonment in the territorial prison not exceeding five years, or by a fine not exceeding $1000, or both.

§ 902. *Erroneous bill, issued in good faith.*—No person can be convicted of an offence under the last two sections by reason of the contents of any barrel, box, case, cask, or other vessel or package mentioned in the bill of lading, receipt or other voucher, did not correspond with the description given in such instrument of the merchandise received, if such description corresponded substantially with the marks, labels or brands upon the outside of such vessel or package, unless it appears that the accused knew that such marks, labels or brands were untrue.

§ 903. *Duplicate bill, etc.*—Every person mentioned in this chapter who issues any second or duplicate receipt or voucher of a kind specified therein, at a time while any former receipt or voucher for the merchandise specified in such second receipt is outstanding and uncancelled, without writing across the face of the same the word "duplicate," in a plain and legible manner, is punishable by impris-

onment in the territorial prison not exceeding five years, or by a fine not exceeding one thousand dollars, or both.

ARKANSAS.

[Acts 1887, page 84.]

AN ACT to Regulate the Duties of Warehousemen, Transportation Companies and Others.

SECTION
1. Not to issue receipts until goods are under his control.
2. Not to issue receipts for money loaned unless goods are actually received.
3. How duplicate receipts are issued.
4. Not to ship goods, etc., without the written assent from party holding receipt.
5. Master or other person not to give bill of lading, etc., unless actually shipped.
6. Receipts of warehousemen, etc., for goods, made negotiable.
7. How transferable.
8. Violation deemed criminal; penalty—Damages; how recovered.
9. Applies to bills of lading.
10. Preceding sections to apply to property removed by process of law.
11. Conflicting laws repealed; Act in force from passage.

Be it enacted by the General Assembly of the State of Arkansas:

SECTION 1. That no warehouseman, wharfinger or other person shall issue any receipt or voucher for any goods, wares, merchandise, cotton, grain, flour or other produce or commodity to any person or persons purporting to be the holder or holders, owner or owners thereof, unless such goods, wares, merchandise, cotton, grain, flour or other produce or commodity shall have been actually received into the store or upon the premises of such warehouseman, wharfinger or other person, and shall be in the store or on the premises aforesaid, and under his control at the time of issuing such receipt.

SEC. 2. That no warehouseman, wharfinger or other person shall issue any receipt or other voucher upon any goods, wares, merchandise, cotton, grain, flour or other produce or commodity to any person or persons for any money loaned or other indebtedness, unless such goods, wares, merchandise, cotton, grain, flour or other produce or commodity shall be, at the time of issuing such receipt, in the custody of such warehouseman, wharfinger or other person, and shall be in store or upon the premises and under his control at the time of issuing such receipt or other voucher as aforesaid.

SEC. 3. That no warehouseman, wharfinger or other person shall issue any second or duplicate receipt for any goods, wares, merchan-

dise, cotton, grain, flour or other produce or commodity, while any former receipt for such goods, wares, merchandise, cotton, grain, flour or other produce or commodity, as aforesaid, or any part thereof, shall be outstanding and uncancelled, without writing across the face of the same "duplicate."

SEC. 4. That no warehouseman, wharfinger or other person shall sell or incumber, ship or transfer, or in any manner remove, or permit to be shipped, transferred or removed beyond his control any such goods, wares, merchandise, cotton, grain, flour or other produce or commodity, for which a receipt shall have been given by him, as aforesaid, whether received for storing, shipping, grinding, manufacturing or other purpose, without the written assent of the person or persons holding such receipt.

SEC. 5. That no master, owner or agent of any boat or vessel of any description, forwarder or officer or agent of any railroad, transfer or transportation company, or other person shall sign, or give away any bill of lading, receipt or other voucher or document for any merchandise or property by which it shall appear that such merchandise or property has been shipped on board of any boat, vessel, railroad car or other vehicle, unless the same shall have been actually shipped and put on board, and shall be at the time actually on board or delivered to such boat, vessel, car or other vehicle, or to the owner or owners thereof, or his or their agent or agents, to be carried and conveyed as expressed in such bill of lading, receipt or other voucher or document.

SEC. 6. That all receipts issued or given by any warehouseman, wharfinger, or other person or firm, and all bills of lading, transportation receipts, and contracts of affreightment issued or given by any person, boat, railroad, transportation or transfer company for goods, wares, merchandise, cotton, grain, flour, or other produce or commodity, shall be and are hereby made negotiable by written indorsement thereon, and delivery in the same manner as bills of exchange and promissory notes; and no printed or written conditions, clauses, or provisions inserted in or attached to any such receipts, bills of lading or contracts, shall in any way limit the negotiability, or affect any negotiation thereof, nor in any manner impair the right and duties of the parties thereto, or persons interested therein; and every such condition, clause, or provision purporting to limit or affect the rights, duties, or liabilities created or declared in this act, shall be void and of no force or effect.

SEC. 7. That warehouse receipts given by any warehouseman, wharfinger, or other person or firm, for any goods, wares, merchan-

dise, cotton, grain, flour, or other produce or commodity, stored or deposited, and all bills of lading and transportation receipts of every kind given by any carrier, boat, vessel, railroad, transportation or transfer company, may be transferred by indorsement in writing thereon, and the delivery thereof so indorsed, and any and all persons to whom the same may be transferred shall be deemed and held to be the owner of such goods, wares, merchandise, cotton, grain, flour or other produce or commodity, so far as to give validity to any pledge, lien, or transfer given, made or created thereby, as on the faith thereof, and no property so stored or deposited, as specified in such bills of lading or receipts, shall be delivered except on surrender and cancellation of such receipts and bills of lading: *Provided*, however, that all such receipts and bills of lading which shall have the words "not negotiable," plainly written or stamped on the face thereof, shall be exempt from the provisions of this act.

SEC. 8. That any warehouseman, wharfinger, forwarder, or other person who shall violate any of the provisions of this act shall be deemed guilty of a criminal offence, and upon indictment and conviction shall be fined in any sum not exceeding five thousand dollars, or imprisoned in the penitentiary of this State not exceeding five years, or both; and all and every person or persons aggrieved by the violation of any of the provisions of this act may have and maintain an action at law against the person or persons, corporation or corporations violating any of the provisions of this act, to recover all damages which he or they may have sustained by reason of any such violation as aforesaid, before any court of competent jurisdiction, whether such person or persons shall have been convicted of fraud as aforesaid under this act or not.

SEC. 9. All the provisions of this act shall apply to bills of lading, and to all persons or corporations, their agents or servants, that shall or may issue bills of lading of any kind or description, the same as if the words "forwarder" and "bills of lading" were mentioned in every section of said act.

SEC. 10. So much of the preceding sections of this act as forbids the delivery of property except on surrender and cancellation of the original receipt or bill of lading, or the indorsement of such delivery thereon in case of partial delivery, shall not apply to property replevied or removed by operation of law.

SEC. 11. All laws and parts of laws in conflict with this act be and the same are hereby repealed, and this act shall take effect and be in force from and after its passage.

Approved March 15, 1887.

CALIFORNIA.

[During's Annotated Codes and Statutes, page 361.]

§ 2126. *Definition of bill of lading.*—A bill of lading is an instrument in writing, signed by a carrier or his agent, describing the freight so as to identify it, stating the name of the consignor, the terms of the contract for carriage, and agreeing or directing that the freight be delivered to the order or assigns of a specified person at a specified place.

§ 2127. *Bill of lading negotiable.*—All the title to the freight which the first holder of a bill of lading had when he received it passes to every subsequent indorsee thereof in good faith and for value, in the ordinary course of business, with like effect and in like manner as in the case of a bill of exchange.

§ 2128. *Same.*—When a bill of lading is made to bearer, or in equivalent terms, a simple transfer thereof, by delivery, conveys the same title as an indorsement.

§ 2129. *Effect of bill of lading on rights, etc., of carrier.*—A bill of lading does not alter the rights or obligations of the carrier, as defined in this chapter, unless it is plainly inconsistent therewith.

§ 2130. *Bill of lading to be given to consignor.*—A carrier must subscribe and deliver to the consignor, on demand, any reasonable number of bills of lading, of the same tenor, expressing truly the original contract for carriage; and if he refuses to do so, the consignor may take the freight from him, and recover from him, besides, all damage thereby occasioned.

§ 2131. *Carrier exonerated by delivering according to bill of lading.*—A carrier is exonerated from liability for freight by delivering thereof, in good faith, to any holder of a bill of lading therefor, properly indorsed, or made in favor of the bearer.

§ 2132. *Carrier may demand surrender of a bill of lading before delivery.*—When a carrier has given a bill of lading, or other instrument substantially equivalent thereto, he may require its surrender, or a reasonable indemnity against claims thereon, before delivering the freight.

DAKOTA.

[Compiled Laws, 1887.]

§ 3855, Civil Code. *Bill of lading defined.*—A bill of lading is an instrument in writing, signed by a carrier or his agent, describing the freight so as to identify it, stating the name of the consignor, the

terms of the contract for carriage, and agreeing or directing that the freight be delivered to the order or assigns of a specified person at a specified place.

§ 3856, Civil Code. *Bill of lading is negotiable.*—All the title to the freight which the first holder of a bill of lading had when he received it passes to every subsequent indorsee thereof, in good faith and for value, in the ordinary course of business, with like effect and in like manner as in the case of a bill of exchange.

§ 3857, Civil Code. *When negotiable by delivery.*—When a bill of lading is made to bearer, or, in equivalent terms, a simple transfer thereof by delivery, conveys the same title as an indorsement.

§ 3858, Civil Code. A bill of lading does not alter the rights or obligations of the carrier, as defined in this chapter, unless it is plainly inconsistent therewith.

§ 3859, Civil Code. *Sets of bills.*—A carrier must subscribe and deliver to the consignor, on demand, any reasonable number of bills of lading of the same tenor, expressing truly the original contract for carriage; and if he refuses to do so the consignor may take the freight from him, and recover from him besides all damages thereby occasioned.

§ 3860, Civil Code. *Delivery according to bill.*—A carrier is exonerated from liability for freight by delivery thereof, in good faith, to any holder of a bill of lading therefor, properly indorsed, or made in favor of the bearer.

§ 3861, Civil Code. *Surrender of bill of lading.*—When a carrier has given a bill of lading, or other instrument substantially equivalent thereto, he may require its surrender, or a reasonable indemnity against claims thereon, before delivering the freight.

§ 6623, Penal Code. *Defacing marks.*—Every person who defaces or obliterates the marks upon wrecked property, or in any manner disguises the appearance thereof with intent to prevent the owner from discovering its identity, or who destroys or suppresses any invoice, bill of lading, or other document tending to show the ownership, is guilty of misdemeanor.

§ 6828, Penal Code. *False invoice, bill of lading, etc.*—Every person guilty of preparing, making, or subscribing any false or fraudulent manifest, invoice, bill of lading, boat's register, or protest, with intent to defraud another, is punishable by imprisonment in the territorial prison not exceeding three years, or by a fine not exceeding one thousand dollars, or both.

§ 6712, Penal Code. *False bill of lading.* Every person whose duty it may be to deliver to any collector of tolls upon any canal that

hereafter may be constructed and owned by this territory, a bill of lading of any property transported upon any such canal, who knowingly delivers a *false bill* of lading as true, or makes or signs a false bill of lading intending to be delivered as true, is punishable by imprisonment in the territorial prison not exceeding one year, or by a fine not exceeding five times the value of any property omitted in such bill, or both.

§ 6866, Completed Laws, 1887, § 677, Penal Code. *Fraudulent bill of lading.*—Every person being the master, owner, or agent, or transportation company, or otherwise being or representing any carrier who delivers any bill of lading, receipt, or other voucher, or by which it appears that any merchandise of any description has been shipped on board any vessel, or delivered to any railroad, express, or transportation company or other carrier, unless the same has been so shipped or delivered, and is at the time actually under the control of such carrier, or the master, owner, or agent of such vessel, or of some officer or agent of such company, to be forwarded as express in such bill of lading, receipt, or voucher, is punishable by imprisonment in the territorial prison not exceeding five years, or by a fine not exceeding one thousand dollars, or both.

§ 6868, § 679, Penal Code. *When not liable.*—No one can be convicted of any offence under the last two sections, by reason that the contents of any barrel, box, case, cask, or other vessel or package mentioned in the bill of lading, receipt, or other vouchers did not correspond with the description given in such instrument of the merchandise received, if such description corresponded substantially with the marks, labels, or brands upon the outside of such vessel or package, unless it appears that the accused knew that such marks, labels, or brands were untrue.

§ 6869, Dig. § 680, Penal Code. *Duplicate must be so marked.*—Every person mentioned in sections 6866 and 6867 who issues any second or duplicate receipt or voucher, of a kind specified in these sections, at a time while any forms, receipts, or vouchers for the merchandise specified in such second receipt are outstanding and uncanceled, without writing across the face of the same the word "duplicate," in a plain and legible manner, is punishable by imprisonment in the territorial prison not exceeding five years, or by a fine not exceeding one thousand dollars, or both.

§ 6870, Dig. § 681, Penal Code. *Sale of goods without consent of holder of bill of lading.*—Every person mentioned in sections 6866 and 6867 who sells, hypothecates, or pledges any merchandise for which any bill of lading, receipt, or voucher has been issued by him,

without the consent in writing thereto of the person holding such bill, receipt, or voucher, is punishable by imprisonment in the territorial prison not exceeding five years, or by a fine not exceeding one thousand dollars, or both.

§ 6871, Dig. § 682, Penal Code. *Must be cancelled on delivery of goods.*—Every person, such as mentioned in section 6867, who delivers to another any merchandise for which any bill of lading, receipt, or voucher has been issued, unless such receipt or voucher bore upon its face the words "not negotiable" plainly written or stamped, or unless such receipt is surrendered to be cancelled at the time of such delivery, or unless, in the case of a partial delivery, a memorandum thereof is indorsed upon such receipt or voucher, is punishable by imprisonment in the territorial prison not exceeding five years, or by a fine not exceeding one thousand dollars, or both.

GEORGIA.

[The Code of the State of Georgia, 1882, page 348.]

§ 1627. *Owners of boats may grant bills of lading.*—It shall be the duty of all owners or agents of boats employed in the navigation of the navigable waters of this state, to grant to each and every boat, respectively, previously to its departure from the wharf or landing, a certificate or bill of lading, showing its destination, contents, and the name of its captain or patroon and consignees, which certificate or bill of lading shall at all times be subject to the examination of any free white person requiring the same.

§ 1628. *Failure to grant bill.*—Any such owner or agent neglecting or refusing to furnish a certificate or bill of lading, and any such captain or patroon refusing to exhibit the same on demand as aforesaid, may be severally indicted, and for every offence be fined in a sum not exceeding fifty dollars—one-half the penalty in such case to go to the informer and the other half to the use of the county where such conviction takes place.

§ 1630. *Owner not to allow articles shipped, unless in the bill.*—No owner, captain, or patroon of such boat shall permit any such boat hand to take with him any such articles, unless the same shall be stated in such certificate or bill of lading, and such articles shall be immediately under the direction of such owner, captain, or patroon, or the agent of the owner, under penalty of fine and imprisonment, at the discretion of the court, for every offence against any of said provisions.

ILLINOIS.

[Starr and Curtis's Annotated Statutes, 1885, vol. I., ch. 27.]

An Act to fix the Liability of Common Carriers receiving property for transportation. Approved March 27, 1874; in force July 1, 1874.

§ 1. *Be it enacted by the People of the State of Illinois, represented in General Assembly,* That whenever any property is received by a common carrier, to be transported from one place to another, within or without this state, it shall not be lawful for such carrier to limit his common-law liability safely to deliver such property at the place to which the same is to be transported, by any stipulation or limitation expressed in the receipt given for such property.

INDIANA.

[Revised Statutes, Annotated Edition, Vol. II.]

§ 4025. *Bill of lading evidence of name or character of railroad.*—Any railroad corporation, lessee, assignee, receiver, and other person or corporation, running, controlling, or operating any railroad into or through this state, shall be liable, jointly or severally, for stock killed or injured by the locomotives, cars, or other carriages run on such road, in the name in which the road was run or operated at the time, to the extent and according to the provisions of this act and the bills of lading usually issued at any railroad station in the county in which such stock was killed or injured, shall be *prima facie* evidence as to the character or name in which said railroad was owned, held, controlled, or operated.

IOWA.

[Revised Code of Iowa, Miller, 1888.]

§ 4088. *False voucher issued by warehousemen, etc.*—If any owner of any boat or vessel, or of any property laden or pretended to be laden on board the same; or if any person concerned in the lading or fitting out such boat or vessel, make out and either exhibit, or cause to be made out and exhibited, any false estimate of any goods or property laden or pretended to be laden on board such boat or vessel, with intent to injure or defraud any insurer of such boat or vessel or property, or any part thereof, he shall be fined not exceeding one thousand dollars, or imprisonment in the penitentiary not more than three years.

§ 2184. *Cannot limit liability.*—No contract, receipt, rule, or regulation shall exempt any corporation or person engaged in transporting persons for hire from the liability of a common carrier, or carrier of passengers, which would exist had no contract, receipt, rule, or regulation been made and entered into.

MARYLAND.

[Public General Laws of Maryland, Vol. I., 1888, page 117, Article XIV.]

ARTICLE XIV.

BILLS OF LADING, STORAGE AND ELEVATOR RECEIPTS.

SECTION

1. Bills of lading to be negotiable instruments.
2. Conclusive evidence of their contents.
3. Storage receipts also to be negotiable.
4. When held to be completely issued.
5. Not to be issued until goods are actually delivered.
6. Duplicates; delivery of goods; penalties.
7. Civil remedies upon.

SECTION 1. All bills of lading and all receipts, vouchers or acknowledgments whatsoever in writing, in the nature or stead of bills of lading for goods, chattels or commodities of any kind, to be transported on land or water, or on both, which shall be executed in this State, or being executed elsewhere, shall provide for the delivery of goods, chattels or commodities of any kind within this State, and all warehouse, elevator or storage receipts whatsoever for goods, chattels or commodities of any kind stored or deposited, or in said receipts stated or acknowledged to be stored or deposited for any purpose in any warehouse, elevator or other place of storage or deposit in this State, shall be and they are hereby constituted and declared to be negotiable instruments and securities, unless it be provided in express terms to the contrary on the face thereof, in the same sense as bills of exchange and promissory notes, and full and complete title to the property in said instruments mentioned or described, and all rights and remedies incident to such title, or arising under or derivable from the said instrument, shall enure to and be vested in each and every *bona fide* holder thereof for value, altogether unaffected by any rights or equities whatsoever, of or between the original or any other prior holders of or parties to the same, of which such *bona fide* holder for value shall not have had actual notice at the time he became such.

SEC. 2. Every instrument of those mentioned and described in section 1, which shall be issued by any person or corporation, or by

any agent or officer of any person or corporation authorized to issue the same on his or its behalf, or authorized or permitted by such person or corporation to issue like instruments on his or its behalf for goods, chattels or commodities, actually received for transportation or held on storage, as the case may be, shall be conclusive evidence in the hands of any *bona fide* holder for value of such instrument, who shall have become such without actual notice to the contrary, that all of the goods, chattels and commodities in said instrument mentioned or described, had been actually received by and were actually in the possession and custody of such person or corporation at the time of issuing the said instrument according to the tenor thereof, and for the purposes and to the effects therein stipulated or provided, notwithstanding that the fact may be otherwise, and that such agent or officer may have had no authority to issue any such instrument on behalf of his said principal, except for goods, chattels or commodities actually received and in possession at the time of such issue.

SEC. 3. Every acceptance of an order and every other voucher whatsoever, for any goods, chattels or commodities as on storage or deposit, whereby the custody or possession of such goods, chattels or commodities shall be acknowledged or certified by any warehouseman, wharfinger or other person or corporation within this State, and which acceptance or voucher shall not on its face provide or stipulate in terms that it shall not be negotiable, shall be held and taken when issued to be a negotiable receipt and instrument to all intents and effects within the meaning and operation of this article.

SEC. 4. Any instrument declared negotiable by this article shall be held and taken to have been issued within the meaning of this article when it shall have been signed and shall have been delivered out of the custody of the person or corporation to be charged or bound by the same, or of his or its agent or officer aforesaid.

SEC. 5. No person or corporation, or agent or officer of any person or corporation in this State, shall issue any bill of lading, receipt, acknowledgment or voucher whatsoever, for goods, chattels or commodities of any kind to be transported on land or water, or on both, or any receipt, acceptance of an order or other voucher for goods, chattels or commodities, as on storage or deposit in this State, until and unless the whole of the said goods, chattels and commodities shall have been actually received to be transported by such person or corporation in the one case, or shall be actually in the possession or custody, or upon the premises, or under the absolute and exclusive control of such person or corporation in the other case at the time

when such instrument shall be issued; and any principal person or corporation, or any agent or officer whatsoever, of any person or corporation, wilfully violating this section, or any of the provisions thereof, shall be guilty of a misdemeanor, and on conviction thereof, shall be subject to a fine of not less than one thousand nor more than five thousand dollars, in the discretion of the court.

SEC. 6. No warehouseman or corporation or person whatsoever having issued or caused to be issued or having outstanding, and issued by any agent or officer of such person or corporation as aforesaid, any receipt, acceptance of order or other voucher for goods, chattels or commodities as on deposit or storage with or in the custody or on the premises, or under the control of such person or corporation, shall issue any other receipt, acceptance of order or other voucher whatsoever for the same, or any part thereof, until the said first issued instrument shall have been returned and cancelled or destroyed; and no person or corporation whatsoever having issued or having outstanding as aforesaid any such receipt, acceptance of order or other voucher aforesaid, and no agent or officer of any such person or corporation shall part with, deliver or remove or permit to be delivered or removed the goods, chattels or commodities in such instrument named or described, or any part thereof, except only to or by the holder of said instrument, or upon his order, and upon the presentation of said instrument with his endorsement in every case, or without cancelling or destroying said instrument in case of complete delivery or removal or endorsing thereon the quantity and description of the goods, chattels or commodities delivered or removed, and the names of the persons to whom delivered, or by whom removed in case such delivery or removal shall be partial only; and any principal person or corporation or agent or officer of any person or corporation wilfully violating this section, or any of the provisions thereof, shall be guilty of a misdemeanor, punishable by a fine of not less than one thousand nor more than five thousand dollars in the case of a corporation, and in the case of an individual by a fine of not less than one hundred nor more than five thousand dollars, and imprisonment in the penitentiary for a period of not less than one year, nor more than three years, in the discretion of the court; provided, however, that nothing herein contained shall be construed to prohibit the *bona fide* issuing of duplicate receipts, acceptances or other vouchers aforesaid, with the word "duplicate" conspicuously written or printed upon the face thereof, in the stead of any original outstanding receipts, acceptances or other vouchers aforesaid, which may have been lost, destroyed or mislaid.

SEC. 7. No person having any claim, right or action whatever under this article or otherwise upon or under any instrument declared negotiable thereby, or by reason of the issuing, negotiation or holding of said instrument, or the doing of any matter or thing by this article forbidden or made punishable, shall be in any way hindered or precluded from asserting or maintaining the same by or because of any prohibitory or punitive provision in this article contained.

ARTICLE XXVII. Vol. I., page 488.

FRAUD-BILLS OF LADING.

SEC. 87. No person or corporation, or agent or officer of any person or corporation in this State, shall issue any bill of lading, receipt, acknowledgment or voucher whatsoever, for goods, chattels or commodities of any kind, to be transported on land or water, or on both, or any receipt, acceptance of an order or other voucher for goods, chattels or commodities, as on storage or deposit in this State, until and unless the whole of the said goods, chattels and commodities shall have been actually received to be transported by such person or corporation, in the one case, or shall be actually in the possession or custody, or upon the premises, or under the absolute and exclusive control of such person or corporation, in the other case, at the time when such instrument shall be issued; and any principal person or corporation, or any agent or officer whatsoever, of any person or corporation, wilfully violating the provisions or any provision of this section, shall be guilty of a misdemeanor, and on conviction thereof shall be subject to a fine of not less than one thousand nor more than five thousand dollars, in the discretion of the court.

MASSACHUSETTS.

[Digest of Public Statutes, 1882, page 1148, § 75.]

§ 75. (Which is G. S. 161, § 65.) *Consignee, etc., fraudulently depositing or pledging property, etc.*—A consignee or factor who deposits or pledges merchandise, or a bill of lading, certificate, or order for the delivery of merchandise consigned or intrusted to him as security for money borrowed, or a negotiable instrument received by him, or disposes of or applies the same to his own use in violation of good faith and with intent to defraud the owner thereof, or with the like fraudulent intent disposes of or applies to his own use any money or negotiable instrument raised or acquired by the sale or other disposition of such merchandise, bill of lading, certificate, or order, shall

be punished by fine not exceeding five thousand dollars, and imprisonment not exceeding five years.

§ 91. (Which is G. S. 161, § 78.) *Making false invoice, etc., of cargo to defraud insurer, etc.*—An owner of a ship or vessel, or of property laden or pretended to be laden on board the same, or any other person concerned in the lading or fitting out of a ship or vessel, who makes out or exhibits or causes to be made out or exhibited a false or fraudulent invoice, bill of lading, bill of parcels, or other false estimates of any goods or property laden or pretended to be laden on board such ship or vessel, with intent to injure or defraud an insurer of such ship, vessel, or property, or any part thereof, shall be punished by imprisonment in the State Prison not exceeding ten years, or by fine not exceeding five thousand dollars, and imprisonment in the jail not exceeding two years.

MICHIGAN.

[Howell's Annotated Statutes, 1882, page 867.]

§ 3383. *Penalty for executing false bill of lading by employé, etc.*—If any officer, agent, clerk, servant, or employé, of any railway company of this State, or which may be doing business in this State, shall execute and deliver to any person or corporation, or execute to be delivered, a bill of lading, receipt, or certificate, which shall purport to be property at the time of executing such bill of lading, receipt, or certificate in possession of such railway company or its agent, when the property is not in the possession or control of said railway company, he shall be deemed guilty of a felony, and on conviction thereof shall be punished by fine not exceeding two thousand dollars, or imprisonment in the State Prison not exceeding three years, or both, in the discretion of the court.

§ 3384. *Fraudulent use of bill of lading as security, etc.*—If any person having possession or control of a bill of lading, receipt, or certificate of any such railway company, knowing the same to have been executed when the property described therein was not in possession of the railway company or agent issuing the same, who shall sell, pledge, or otherwise dispose of such bill of lading, receipt, or certificate, for a valuable consideration or as security for a past debt, shall be deemed guilty of a felony, and on conviction thereof, shall be punished by a fine not exceeding three thousand dollars, or imprisonment in the State Prison not exceeding three years, or both, in the discretion of the court.

MINNESOTA.

[Statutes, 1878, page 1013.]

§ 17. *Warehouse receipts, etc., negotiable, and indorsee to be owner of property, exceptions.*—Warehouse receipts, given for any goods, wares and merchandise, grain, flour, produce or other commodity, stored or deposited with any warehouseman, or other person or corporation in this State, or bills of lading, or receipt for the same, when in transit by cars or vessels to any such warehouseman, or other person, shall be negotiable, and may be transferred by indorsement and delivery of such receipt or bill of lading; and any person to whom the said receipt or bill of lading may be transferred, shall be deemed and taken to be the owner of the goods, wares, or merchandise therein specified, so as to give security and validity to any lien created on the same, subject to the payment of freight and charges thereon: provided, that all warehouse receipts, or bills of lading, which shall have the words "not negotiable" plainly written or stamped on the face thereof, shall be exempt from the provisions of this act. (Id. § 5.)

[Supplement, 1888, page 1037.]

§ 471. *Issuing fictitious bills of lading, etc.*—A person being the master, owner, or agent of any vessel, or officer or agent of any railway, express, or transportation company, or otherwise being or representing any carrier who delivers any bill of lading, receipt, or other voucher, by which it appears that merchandise of any kind has been shipped on board a vessel, or delivered to a railway, express or transportation company, or other carrier, unless the same has been so shipped or delivered, and is at the time actually under the control of such carrier, or the master, owner, or agent of such vessel, or of some officer or agent of such company, to be forwarded as expressed in such bill of lading, receipt, or voucher, is punishable by imprisonment in a county jail not exceeding one year, or by a fine not exceeding one thousand dollars, or by both.

§ 472. *Issuing fictitious warehouse receipts, etc.*—A person carrying on the business of a warehouseman, wharfinger, or other depositary of property, who issues any receipt, bill of lading, or other voucher for grain or merchandise of any kind which has not been actually received upon the premises of such person, and is not under his actual control at the time of issuing such instrument, whether such instrument is issued to a person as being the owner of such grain or merchandise, or as security for any indebtedness, is punishable by

imprisonment in a county jail not exceeding one year, or by a fine not exceeding one thousand dollars, or by both.

§ 473. *Ib. Issued in good faith, excepted.*—No person can be convicted of any offence under the last two sections, for the reason that the contents of any barrel, box, case, or cask, or other vessel or package mentioned in the bill of lading, receipt, or other voucher did not correspond with the description given in such instrument of the merchandise received, if such description corresponds substantially with the marks, labels, or brands upon the outside of such vessel or package, unless it appears that the defendant knew that such marks, labels, or brands were untrue.

§ 474. *Duplicate receipt must be marked.*—A person mentioned in sections four hundred and seventy-one and four hundred and seventy-two, who issues any second or duplicate receipt or voucher of any kind specified in those sections, at a time while a former receipt or voucher for the grain or merchandise specified in such second receipt is outstanding and uncanceled, without writing across the face of the same the word "duplicate" in a plain and legible manner, is punishable by imprisonment in a county jail not exceeding one year, or by a fine not exceeding one thousand dollars, or by both.

§ 475. *Selling, etc., property received for transportation or storage.*—A person mentioned in sections four hundred and seventy-one and four hundred and seventy-two, who sells or pledges any merchandise for which a bill of lading, receipt, or other voucher has been issued by him, without the consent in writing thereto of the person holding such bill, receipt, or voucher, is punishable by imprisonment in a county jail not exceeding one year, or by a fine not exceeding one thousand dollars, or both.

[Statutes, 1891, Vol. I.]

§ 509. *Common law liability.*—(d) Whenever any property is received by any common carrier subject to the provisions of this act, to be transported from one place to another within this State, it shall be unlawful for such common carrier to limit in any way, except as stated in its classification schedule, hereinafter provided for, its common law liability with reference to such property while in its custody as a common carrier (as hereinbefore mentioned), such liability must include the absolute responsibility of the common carrier for the acts of its agents in relation to such property.

1887, ch. 10, sec. 3. Supersedes and contains sections 19, 26, and last half of sec. 15, ch. 188, laws 1885; sec. 9, ch. 103, laws 1875; sections 11 and 12, ch. 26, laws 1874. 34 M. 88.

[Statutes, 1891, Vol. 2. Fraudulent Issue of Documents of Title to Merchandise].

§ 6451. *Issuing fictitious bills of lading, etc.*—A person being the master, owner, or agent of any vessel, or officer or agent of any railway, express or transportation company, or otherwise being or representing any carrier, who delivers any bill of lading, receipt or other voucher, by which it appears that merchandise of any kind has been shipped on board a vessel, or delivered to a railway, express or transportation company, or other carrier, unless the same has been so shipped or delivered, and is at the time actually under the control of such carrier or the master, owner or agent of such vessel, or of some officer or agent of such company, to be forwarded as expressed in such bill of lading, receipt or voucher, is punishable by imprisonment in a county jail not exceeding one year, or by a fine not exceeding one thousand dollars, or both.

P. C. Sec. 471. Same as Sec. 628, N. Y. Penal Code.

§ 6452. *Issuing fictitious warehouse receipts.*—A person carrying on the business of a warehouseman, wharfinger or other depositary of property, who issues any receipt, bill of lading, or other voucher for grain or merchandise of any kind which has not been actually received upon the premises of such person, and is not under his actual control at the time of issuing such instrument, whether such instrument is issued to a person as being the owner of such grain or merchandise, or as security for any indebtedness, is punishable by imprisonment in a county jail not exceeding one year, or by a fine not exceeding one thousand dollars, or by both.

P. C. Sec. 472. Same as Sec. 629, N. Y. Penal Code. Substantially contains Sec. 31 (42), ch. 95, G. S.

MISSOURI.

[Revised Statutes, 1889, Vol. I.]

CHAPTER 18.

BILLS OF LADING—WAREHOUSE RECEIPTS.

SECTION

739. Warehouseman, etc., not to issue receipt until goods actually in store.
740. Not to issue any receipt for money loaned, etc., until goods actually in store.
741. Not to issue second receipt when.
742. Not to sell, etc., goods without written assent of person holding receipt.
743. Not to give shipping receipt until goods actually on boat, etc.
744. Receipts, bills of lading, etc., declared negotiable.
745. How transferred—lien created—exception.
746. Penalty for violation of the provisions of this act.
747. This act applicable to bills of lading, etc.
748. Exception as to application.

SEC. 739. *Warehouseman, etc., not to issue receipt until goods actually in store.*—No warehouseman, wharfinger, or other person, shall issue any receipt or other voucher for any goods, wares, merchandise, grain, flour, or other produce or commodity, to any person or persons purporting to be the holder, owner or owners thereof, unless such goods, wares, merchandise, grain, or other produce or commodity shall have been actually received in store upon the premises of such warehouseman, wharfinger, or other person, and shall be in the store or on the premises aforesaid and under his control at the time of issuing such receipt. (R. S. 1879, § 553, a.)

SEC. 740. *Not to issue any receipt for money loaned, etc., until goods actually in store.*—No warehouseman, wharfinger, or other person shall issue any receipt or other voucher upon any goods, wares, merchandise, grain, flour, or other produce or commodity, to any person or persons for any money loaned, or other indebtedness, unless such goods, wares, merchandise, grain, flour, or other produce or commodity shall be at the time of issuing such receipt in the custody of such warehouseman, wharfinger, or other person, and shall be in store or upon the premises and under his control at the time of issuing such receipt or other voucher as aforesaid. (R. S. 1879, § 554.)

SEC. 741. *Not to issue second receipt, when.*—No warehouseman, wharfinger, or other person shall issue any second or duplicate receipt for any goods, wares, merchandise, grain, flour, or other produce or commodity, while any former receipt for any such goods, wares,

merchandise, grain, flour, or other produce or commodity, as aforesaid, or any part thereof, shall be outstanding and uncanceled, without writing across the face of the same *duplicate*. (R. S. 1879, § 555.)

SEC. 742. *Not to sell, etc., goods without written assent of person holding receipt.*—No warehouseman, wharfinger, or other person, shall sell or incumber, ship, transfer, or in any manner remove, or permit to be shipped, transferred, or removed beyond his control, any goods, wares, merchandise, grain, flour, or other produce or commodity, for which a receipt shall have been given by him as aforesaid, whether received for storing, shipping, grinding, manufacturing, or other purpose, without the written assent of the person or persons holding such receipt. (R. S. 1879, § 556.)

SEC. 743. *Not to give shipping receipt until goods are actually on boat, etc.*—No master, owner or agent of any boat or vessel of any description, forwarder or officer or agent of any railroad, transfer or transportation company, or other person, shall sign or give any bill of lading, receipt or other voucher or document for any merchandise or property, by which it shall appear that such merchandise or property has been shipped on board of any boat, vessel, railroad-car or other vehicle, unless the same shall have been actually shipped and put on board, and shall be at the time actually on board, or delivered to such boat, vessel, car or other vehicle, to be carried and conveyed as expressed in such bill of lading, receipt or other voucher or document. (R. S. 1879, § 557, b.)

SEC. 744. *Receipts, bills of lading, etc., declared negotiable.*—All receipts issued or given by any warehouseman, or other person or firm, and all bills of lading, transportation-receipts and contracts of affreightment, issued or given by any person, boat, railroad or transportation or transfer company, for goods, wares, merchandise, grain, flour, or other produce, shall be and are hereby made negotiable by written indorsement thereon, and delivery in the same manner as bills of exchange and promissory notes; and no printed or written conditions, clauses or provisions inserted in or attached to any such receipts, bills of lading or contracts, shall in any way limit the negotiability or affect any negotiation thereof, nor in any manner impair the right and duties of the parties thereto, or persons interested therein; and every such condition, clause or provision purporting to limit or affect the rights, duties or liabilities created or declared in this chapter, shall be void and of no force or effect. (R. S. 1879, § 558, c.)

SEC. 745. *How transferred, lien created, exception.*—Warehouse receipts given by any warehouseman, wharfinger or other person or firm, for any goods, wares, merchandise, grain, flour or other produce

or commodity, stored or deposited, and all bills of lading and transportation-receipts of every kind, given by any carrier, boat, vessel, railroad, transportation or transfer company, may be transferred by indorsement in writing thereon, and the delivery thereof so indorsed: and any and all persons to whom the same may be so transferred shall be deemed and held to be the owner of such goods, wares, merchandise, grain, flour or other produce or commodity, so far as to give validity to any pledge, lien or transfer given, made or created thereby, as on the faith thereof, and no property so stored or deposited, as specified in such bills of lading or receipts, shall be delivered, except on surrender and cancellation of such receipts and bills of lading: *Provided*, however, that all such receipts and bills of lading, which shall have the words "not negotiable" plainly written or stamped on the face thereof, shall be exempt from the provisions of this act. (R. S. 1879, § 559, d.)

Sec. 746. *Penalty for violation of the provisions of this chapter.*—Any warehouseman, wharfinger, forwarder or other person who shall violate any of the provisions of this chapter shall be deemed guilty of a criminal offence, and, upon indictment and conviction, shall be fined in any sum not exceeding five thousand dollars, or imprisonment in the penitentiary of this State not exceeding five years, or both; and all and every person or persons aggrieved by the violation of any of the provisions of this chapter may have and maintain an action at law against the person or persons, corporation or corporations, violating any of the provisions of this chapter, to recover all damages, immediate or consequential, which he or they may have sustained by reason of any such violation, as aforesaid, before any court of competent jurisdiction, whether such person or persons shall have been convicted of fraud, as aforesaid, under this chapter, or not. (R. S. 1879, § 560.)

Sec. 747. *This chapter applicable to bills of lading.*—All the provisions of this chapter shall apply and be applicable to bills of lading, and to all persons or corporations, their agents or servants, that shall or may issue bills of lading of any kind or description, the same as if the words forwarder and bills of lading were mentioned in every section of said chapter. (R. S. 1879, § 561.)

Sec. 748. *Exception as to application.*—So much of the preceding sections of this chapter as forbids the delivery of property, except on surrender and cancellation of the original receipt or bill of lading, or the indorsement of such delivery thereon in case of partial delivery, shall not apply to property replevied or removed by operation of law. (R. S. 1879, § 562.)

NEBRASKA.

[Compiled Statutes, 1889, page 1023.]

§ 130. *False bills of lading and receipts.*—If any person shall execute or deliver, or shall cause or procure to be executed and delivered, to any person any false or fictitious bill of lading, receipt, schedule, invoice, or other written instrument, to the purport and effect that any goods, wares, merchandise, live stock, or other property usually transported by carriers, had been or were held, delivered, received, placed, or deposited on board of any steamboat, or watercraft, navigating the waters in or bordering upon the state of Nebraska, or at the freight office, depot, station, or other place designated or used by any railroad company or other common carrier, for the reception of any such property so usually transported by carriers, when such goods, wares, merchandise, live stock, or other property were not held, or had not in fact and in good faith been delivered, received, or deposited on board of such steamboat, or other watercraft, or at such freight office, depot, station, or other place so designated or used by any common carrier for the reception of such property, when such bill of lading, receipt, invoice, schedule, or other written instrument was made and delivered, according to the purport and effect of such bill of lading, receipt, invoice, schedule, or other written instrument, with intent to deceive, defraud, or injure any person or corporation, or if any person shall attempt to indorse, assign, transfer, or put off any such false or fictitious bill of lading, receipt, invoice, schedule, or other written instrument, knowing the same to be false, fraudulent, or fictitious, the person so offending shall be imprisoned in the penitentiary not exceeding four years nor less than one year.

§ 131. *False bills of lading and receipts.*—If any person shall execute and deliver, or shall cause or procure to be executed and delivered to any other person, any false and fictitious warehouse receipt, acknowledgment, or other instrument of writing, to the purport and effect that such person, or any other person or persons, co-partnership, firm, body politic or corporate, which he or she represents, or pretends to represent, held or had received in store, or held or had received in any warehouse, or in any other place, or held or had received into possession, custody, or control, of such person or persons, co-partnership, firm, or body politic, any goods, wares, or merchandise, when such goods, wares, or merchandise were not held and had not been received in good faith, according to the purport and effect of such warehouse receipt, receipt, acknowledgment, or instru-

ment of writing, with intent to defraud, deceive, or injure any person whomsoever, or if any person shall indorse, assign, transfer, or deliver, or shall attempt to indorse, transfer, or deliver, to any other person any such false and fictitious warehouse receipt, receipt, acknowledgment, or instrument of writing, knowing the same to be false, fraudulent, or fictitious, such person shall be punished by imprisonment in the penitentiary not more than three years nor less than one year.

NEW YORK.

[Revised Statutes, Codes, and Laws, 1889, Vol. II., page 1143.]

§ 2. *Factors. Lien when not to exist.*—The lien provided for in the preceding section, shall not exist where such consignee shall have notice, by the bill of lading or otherwise, at or before the advancing of any money or security by him, or at or before the receiving of such money or security by the person in whose name the shipment shall have been made, that such person is not the actual and *bona fide* owner thereof. (Id., § 2.)

§ 3. *When factor deemed owner.*—Every factor or other agent intrusted with the possession of any bill of lading, custom-house permit, or warehouse-keeper's receipt for the delivery of any such merchandise, and every such factor or agent not having the documentary evidence of title, who shall be intrusted with the possession of any merchandise for the purpose of sale, or as a security for any advances to be made or obtained thereon, shall be deemed to be the true owner thereof, so far as to give validity to any contract made by such agent with any other person, for the sale or disposition of the whole or any part of such merchandise, for any money advanced, or negotiable instrument or other obligation in writing given by such other person upon the faith thereof. (Id. § 3.)

§ 11. *Fraud. Issuing fictitious bills of lading.*—A person being the master, owner, or agent of any vessel, or officer or agent of any railway, express, or transportation company, or otherwise being or representing any carrier, who delivers any bill of lading, receipt, or other voucher, by which it appears that merchandise of any kind has been shipped on board a vessel, or delivered to a railway, express, or transportation company, or other carrier, unless the same has been so shipped or delivered, and is at the time actually under the control of such carrier, or the master, owner, or agent of such vessel, or of some officer or agent of such company, to be forwarded as expressed in such bill of lading, receipt, or voucher, is punishable by imprisonment not

exceeding one year, or by a fine not exceeding one thousand dollars, or by both. (Penal Code, § 628.)

§ 12. *Issuing fictitious warehouse receipts.*—A person carrying on the business of a warehouseman, wharfinger, or other depositary of property, who issues any receipt, bill of lading, or other voucher for merchandise of any kind which has not been actually received upon the premises of such person, and is not under his actual control at the time of issuing such instrument, whether such instrument is issued to a person as being the owner of such merchandise, or as security for any indebtedness, is punishable by imprisonment not exceeding one year, or by a fine not exceeding one thousand dollars, or by both. (Penal Code, § 629.)

§ 13. *Last two sections qualified.*—No person can be convicted of an offence under the last two sections, for the reason that the contents of any barrel, box, case, cask, or other vessel or package mentioned in the bill of lading, receipt, or other voucher did not correspond with the description given in such instrument of the merchandise received, if such description corresponds substantially with the marks, labels, or brands upon the outside of such vessel or package, unless it appears that the defendant knew that such marks, labels, or brands were untrue. (Penal Code, § 630.)

§ 14. *Duplicate receipts must be marked.*—A person mentioned in sections 628 and 629, who issues any second or duplicate receipt or voucher, of a kind specified in those sections, at a time while a former receipt or voucher for the merchandise specified in such second receipt is outstanding and uncancelled, without writing across the face of the same the word "duplicate," in a plain and legible manner, is punishable by imprisonment not exceeding one year, or by a fine not exceeding one thousand dollars, or by both. (Penal Code, § 631.)

§ 15. *Selling, etc., property received for transportation or storage.*—A person mentioned in sections 628 and 629, who sells or pledges any merchandise for which a bill of lading, receipt, or voucher has been issued by him, without the consent in writing thereto of the person holding such bill, receipt, or voucher, is punishable by imprisonment not exceeding one year, or by a fine not exceeding one thousand dollars, or by both. (Penal Code, § 632.)

§ 16. *Bill of lading, when to be cancelled.*—A person mentioned in section 629, who delivers to another any merchandise for which a bill of lading, receipt or voucher has been issued, unless such receipt or voucher bears upon its face the words "not negotiable," plainly written or stamped, or unless such receipt is surrendered to be cancelled at the time of such delivery, or unless, in the case of a partial

delivery, a memorandum thereof is indorsed upon such receipt or voucher, is punishable by imprisonment not exceeding one year, or by a fine not exceeding one thousand dollars, or by both. (Pen. Code, § 633.)

§ 18. *Interest.*—Demand loans of five thousand dollars and upward, on collateral, may bear any interest. In any case hereafter in which advances of money, repayable on demand, to an amount not less than five thousand dollars, are made upon warehouse receipts, bills of lading, certificates of stocks, certificates of deposit, bills of exchange, bonds or other negotiable instruments pledged as collateral security for such repayment, it shall be lawful to receive or to contract to receive and collect, as compensation for making such advances, any sum to be agreed upon, in writing, by the parties to such transaction. (L., 1882, c. 237, § 1.)

Section 2 repeals all inconsistent acts.

[Vol. 3, page 2718, "Shipping."]

§ 42. *Making false manifest, and invoice, etc.*—A person guilty of preparing, making or subscribing, a false or fraudulent manifest, invoice, bill of lading, ship's register or protest, with intent to defraud another, is punishable by imprisonment in a state prison not exceeding three years, or by a fine not exceeding one thousand dollars, or both. (Pen. Code, § 577.)

[Vol. 3, page 3363, "Wrecks."]

§ 25. *Defacing marks upon wrecked property.*—A person who defaces or obliterates the marks upon wrecked property, or in any manner disguises the appearance thereof, with intent to prevent the owner from discovering its identity, or who destroys or suppresses any invoice, bill of lading or other document tending to show the ownership thereof, is guilty of a misdemeanor. (Pen. Code, § 372.)

§ 27. *Destroying invoice.*—A person who wilfully destroys or suppresses an invoice, bill of lading, or any other document, writing, or thing whatever, which tends to show the ownership of wrecked property, is guilty of a misdemeanor. (Pen. Code, § 437.)

[Revised Statutes, Vol. CXI., p. 2259, etc. L. 1858, chap. 326.]

AN ACT to prevent the issue of false receipts, and to punish fraudulent transfers of property by warehousemen, wharfingers, and others.

SEC. 1. *When warehousemen, etc., may issue receipts, etc.*—No warehouseman, wharfinger, public or private inspector, or custodian

of property, or other person, shall issue any receipt, acceptance of an order, or other voucher, for or upon any goods, wares, merchandise, provisions, grain, flour, or other produce or commodity, to any person or persons purporting to be the owner or owners thereof, or entitled or claiming to receive the same, unless such goods, wares, merchandise, provisions, grain, flour, or other commodity, shall have been actually received into the store or upon the premises of such warehouseman, wharfinger, inspector, custodian, or other person, and shall be in store or on the said premises, as aforesaid, and under his control at the time of issuing such receipt, acceptance, or voucher. (Thus amended by L. 1866, ch. 440.)

SEC. 2. *No receipt to be issued unless goods in possession.*—No warehouseman, wharfinger, or other person, shall issue any receipt or other voucher upon any goods, wares, merchandise, grain, flour, or other produce or commodity, to any person or persons as security for any money loaned or other indebtedness, unless such goods, wares, merchandise, grain, or other produce or commodity, shall be at the time of issuing such receipt in the custody of such warehouseman, wharfinger, or other person, and shall be in store or upon the premises and under his control at the time of issuing such receipt or other voucher, as aforesaid.

SEC. 3. *Duplicate receipts, etc.*—No warehouseman, wharfinger, inspector, custodian, or other person, shall issue any second or duplicate receipt, acceptance, or other voucher, for or upon any goods, wares, merchandise, provisions, grain, flour, or other produce or commodity, while any former receipt, acceptance or voucher, for or upon any such goods, wares, merchandise, provisions, flour, grain, or other produce or commodity, as aforesaid, or any part thereof, shall be outstanding and uncancelled, without writing in ink across the face of the same, "duplicate." (Thus amended by L. 1866 ch. 440.)

SEC. 4. *Shall not sell, etc.*—No warehouseman, wharfinger, or other person, shall sell or encumber, ship, transfer, or in any manner remove beyond his immediate control, any goods, wares, merchandise, grain, flour, or other produce or commodity, for which a receipt shall have been given by him as aforesaid, whether received for storing, shipping, grinding, manufacturing, or other purposes, without the written assent of the person or persons holding such receipt.

SEC. 5. *No master to sign or give bill of lading in certain cases.*—No master, owner, or agent of any vessel or boat of any description, or officer or agent of any railroad company, or other person, shall sign or give any bill of lading, receipt, or other voucher or document, for any merchandise or property, by which it shall

appear that such merchandise or property has been shipped on board any vessel, boat, or railroad car, unless the same shall have been actually shipped and put on board, and shall be at the time actually on board or delivered to such vessel, boat, or car, to be carried and conveyed as expressed in such bill of lading, receipt, or other voucher or document.

SEC. 6. *Warehouse receipts transferable.*—Warehouse receipts given for any goods, wares, merchandise, grain, flour, produce or other commodity, stored or deposited with any warehouseman, wharfinger or other person, may be transferred by indorsement thereof; and any person to whom the same may be so transferred shall be deemed and taken to be the owner of the goods, wares and merchandise therein specified, so far as to give validity to any pledge, lien or transfer made or created by such person or persons; but no property shall be delivered except on surrender and cancellation of said original receipt, or the indorsement of such delivery thereon in case of partial delivery. All warehouse receipts, however, which shall have the words "not negotiable," plainly written or stamped on the face thereof, shall be exempt from the provisions of this section. (See L. 1859, ch. 353, *post.*)

SEC. 7. *Penalty.*—Any warehouseman, wharfinger, inspector, custodian, or other person, who shall wilfully violate any of the foregoing provisions of the said act, as hereby amended, shall be deemed guilty of a misdemeanor, and upon indictment and conviction, shall be fined in any sum not exceeding one thousand dollars, or imprisonment not exceeding one year, or by both such fine and imprisonment; and all and every person or persons aggrieved by the violation of any of the provisions of said act, as hereinbefore mentioned, may have and maintain an action at law against the person or persons violating any of the provisions of said act as hereby amended, to recover all damages, immediate or consequential, which he or they may have sustained by reason of any such violation as aforesaid, before any court of competent jurisdiction, whether such person shall have been convicted as hereinbefore mentioned, or not. (Thus amended by L. 1866, ch. 440.)

SEC. 8. *Limitation of act.*—So much of the preceding fourth and sixth sections as forbids the delivery of property except on surrender and cancellation of the original receipt, or the indorsement of such delivery thereon in case of partial delivery, shall not apply to property replevied or removed by operation of law.

[L. 1859, Chap. 353.]

AN ACT *to amend the act entitled "An act to prevent the issue of false receipts, and to punish fraudulent transfers of property by warehousemen, wharfingers and others," passed April seventeenth, eighteen hundred and fifty-eight.*"

AMENDMENT, SEC. 1. The sixth section of the act entitled "An act to prevent the issue of false receipts, and to punish fraudulent transfers of property by warehousemen, wharfingers and others," is hereby amended by adding at the end of said section the following words: "All the sections of the act hereby amended, shall apply to and be applicable to bills of lading, and to all persons or corporations that shall or may issue bills of lading of any kind or description, the same as if the words 'forwarder and bills of lading' were mentioned in each and every section of said act."

(This act is given in full, that the reader may judge for himself as to its meaning.)

OHIO.

[Revised Statutes, 1890, Vol. II., pages 2437-2442.]

(9649) SEC. 77. Every master of a boat or float, conveying property on either of the canals, shall exhibit to the several collectors hereinafter mentioned, a just and true account, or bill of lading of such property, signed by the consignor thereof, and containing, first, the name of each place on the canal where any portion of such property was shipped, and the place for which it is intended to be cleared, specifying the portion shipped at each of such places, and the portion intended to be cleared to each place; second, a statement of the weight of all articles of such property on which toll is to be charged by weight, of the number of articles on which toll is to be charged by number, and of the feet of each article on which toll is to be charged by the foot; third, a specification of the weight or quantity of each article or articles on which one rate of toll is to be charged, and which is to be transported to one place, separately from other articles on which a different rate of toll is charged, or which is to be transported to a different place.

(9650) SEC. 78. Every such account or bill of lading shall be exhibited, first, to every collector of whom a clearance shall be required; second, to every collector whose office shall be next in order in the course of the voyage, to the place where the clearance shall have been granted; third, to every collector at a place where any portion

of the cargo shall be unladen, or any additional cargo received; and if there be no collector at such place, to the collector whose office shall be next in order in the course of the voyage; fourth, to every other collector who shall demand such account or bill of lading to be exhibited.

(9651) SEC. 79. If any property shall be received on board of any boat or other float, for the purpose of being transported on either of the canals, during any voyage, after such boat or float shall have proceeded one mile from the place at which a clearance for the voyage was granted, an account or bill of lading thereof, conforming to all the requisitions hereinbefore stated, shall be exhibited to the collector whose office shall be next in order in the course of the voyage, to the place where such property was received on board, to whom the full amount of tolls chargeable on such property shall be paid; and such boat or float shall not be permitted to proceed on such voyage beyond the office at which the tolls on such property, so received on board, are payable, until the full amount of such tolls are paid.

(9652) SEC. 80. When any cargo shall be taken on board of any boat or float, after such boat or float shall have left the place where a clearance was granted, as specified in the preceding section, the account or bill of lading of such property shall be exhibited to the collector whose office shall be next in order in the course of the voyage, to the office at which the tolls on such additional cargo are required to be paid, and to every other collector who shall demand it to be exhibited.

(9653) SEC. 81. If there be no collector's office within one mile of the place where a voyage on the canal shall be commenced, nor within one mile of the place where the same shall terminate, nor at any intermediate place, the master of the boat or other float shall, within ten days after the termination of such voyage, exhibit a true account thereof, or bill of the lading transported on board of such boat or float, at any time during such voyage, to the collector whose office shall be nearest to the place where such voyage terminated, and shall pay to such collector the tolls due on such boat or float and lading; and every master who shall neglect to exhibit such account and bill, and to pay such tolls, within the period above limited, shall, for every such offence, forfeit the sum of twenty-five dollars.

(9654) SEC. 82. Every master of a boat or other float navigating either of the canals, who shall omit to exhibit or deliver a true bill of lading to any collector, or to pay the tolls thereon when required, or shall deliver any article mentioned in a bill of lading at a place

beyond that to which such article shall have been cleared, shall forfeit the sum of twenty-five dollars.

(9655) SEC. 83. Every person who shall sign or deliver to any collector a false bill of lading, shall pay on all property omitted in such false bill, treble the established rates of toll chargeable thereon, to any collector who shall be satisfied of such omission for the whole distance such property is conveyed on the canal.

(9656) SEC. 84. Every person who shall knowingly sign or deliver a false bill of lading, shall be deemed guilty of a misdemeanor; and upon conviction thereof before any court of competent jurisdiction, shall be fined not less than three times the value of the property omitted or falsely stated in such bill.

(9657) SEC. 85. Every collector receiving a bill of lading, may require the master exhibiting it to verify it by his oath, which such collector is authorized to administer.

(9659) SEC. 87. If, on unloading any boat or float, it shall be discovered that the cargo, in consequence of an unintentional error, exceeds the quantity stated in the bill or bills of lading, it shall be the duty of the master of such boat or float, immediately to report such overplus, and pay the lawful tolls thereon, to the collector at the place where such error may be discovered, if there be any collector at such place; and if there be no collector at such place, to the next collector, at or near whose office the boat shall arrive, after the discovery of such error is made; and any master of a boat or float, who shall fail to comply with the requisition of this section, shall forfeit and pay the sum of ten dollars, besides double tolls on all property omitted in the bill or bills of lading.

(9666) SEC. 94. Whenever a difference shall arise between a collector and the master of any boat or float, as to the amount of tolls chargeable on the lading of such boat or float, the collector shall detain the boat or float and the articles on which toll is to be charged and shall weigh, count, or measure the articles as the case may require; and if it shall be ascertained that the weight, number, or feet exceeds the amount stated in the bill of lading thereof, the collector shall charge tolls according to the weight, number, or feet thus found; and the master shall pay to the collector the expense of such weighing, counting, or measuring; and such expense shall be chargeable on such articles, and on the boat or float containing them.

(9679) SEC. 107. It shall be the duty of every collector to whom bills of lading are required to be presented in order to obtain a clearance for any voyage, agreeably to the seventy-fifth (seventy-seventh)

and seventy-sixth (seventy-eighth) sections of this act to make out from such bill or bills of lading in a book to be provided by him for that purpose, a certificate containing a pertinent description of the articles composing the cargo of the boat or float, or composing such float for which clearance is about to be issued, properly classified and designated with reference to the rates and amount of tolls chargeable thereon; which certificate shall be signed by the master of such boat or float, who shall also attest on oath or affirmation to the correctness thereof if required by the collector, before the clearance for such boat or float shall be issued.

(9681) SEC. 109. Every master of any boat or float, who shall, in any respect, refuse to comply with the requirements of the two preceding sections, or who shall sign a false certificate, shall, for every such refusal or offence, forfeit the sum of twenty-five dollars.

(9683) SEC. 111. On the arrival of any boat or float at the place of destination, or at any place in the course of the voyage where there is a collector's office, if in the day-time, the master thereof shall immediately present to the collector the bill or bills of lading, as required by the seventy-sixth (seventy-eighth), seventy-seventh (seventy-ninth) and seventy-eighth (eightieth) sections of this act, together with the clearance and list of passengers; and if such boat or float shall arrive in the night-time, the same shall be presented between the time of arrival and one hour after sunrise.

(9686) SEC. 114. No part of the cargo of any boat or float, nor any article composing such float, or any part thereof, shall be unladen, landed or removed from the canal, at the termination of any voyage on such canal, nor at any place on the canal within one mile of a collector's office, until the clearance, together with the bill or bills of lading, of the whole cargo of such boat or float, shall have been presented to the proper collector, and a permit obtained from such collector for such unlading, landing or removal; which permit such collector is hereby required to grant, after a reasonable time shall have elapsed for the examination of such clearance, bills of lading and cargo, and on the payment of all tolls which shall remain due; and for every violation of the provisions of this section, the master of such boat or float shall forfeit and pay the sum of ten dollars, and also double the amount of tolls chargeable on the article or articles so unlawfully landed, removed, or unladen; *provided*, that in all cases where any boat shall be in a leaky condition, or from any other cause, goods or property on board any such boat shall be in danger of damage or perishing by delay, and the proper collector cannot be

found, such goods or property may be landed or secured until such collector may be found, and a permit obtained for the further removal of the same.

[Criminal Code, 1890, page 253.]

SEC. 7085. *False or fictitious bills of lading.*—Whoever executes and delivers to any person any false or fictitious bill of lading, receipt, schedule, invoice, or other written instrument, to the purport or effect that any property usually transported by carriers had been or was held, delivered, received, or deposited on board of any steamboat or water-craft navigating the waters in or bordering upon the State of Ohio, or at the freight office, depot, station, or other place designated or used by any railroad company, or other common carrier, for the reception of any such property, when such property was not held, or had not, in fact and in good faith, been delivered, received, or deposited on board such steamboat or other water-craft, or at such place, at the time such written instrument was made and delivered, with intent to defraud, or indorses, assigns, transfers, or puts off, or attempts to indorse, assign, transfer, or put off, any such false or fictitious bill of lading, receipt, invoice, schedule, or other written instrument, knowing the same to be false, fraudulent, or fictitious, shall be imprisoned in the penitentiary not more than four years nor less than one year.

OREGON.

[Hill's Annotated Laws, 1887, Vol. I., page 917.]

§ 1782. *Making or exhibiting false bill of lading with intent to injure insurer.* If the owner of any ship, steamboat, or other vessel, or of any property laden or pretended to be laden on board the same, or if any other person concerned or assisting in the fitting out or lading of any such ship, steamboat, or other vessel, shall make out or exhibit, or cause to be made out or exhibited, any false or fraudulent invoice, bill of lading, bill of parcels, or other false estimate of any property laden or pretended to be laden on board of such ship, steamboat, or other vessel, with intent to injure or defraud any insurer of such ship, steamboat, or other vessel or property, or any part thereof, such person, upon conviction thereof, shall be punished by imprisonment in the penitentiary not less than six months nor more than three years.

PENNSYLVANIA.

[Purdon's Digest, 1883, p. 145; Pamphlet Laws, 1363; Act 24 Sept. 1866.]

Warehouse receipts and bills of lading to be negotiable, sec. 1.
How transferable, sec. 1.
Lien of holder, sec. 1.
Property not to be delivered except on surrender of receipt, etc., secs. 1 and 4.

SECTION 1. *All warehouse receipts and bills of lading marked "not negotiable" are excepted from the provisions of this act.*—Warehouse receipts given for any goods, wares, merchandise, grain, flour, produce, petroleum or other commodities, stored or deposited with any warehouseman, wharfinger or other person in this State, or bills of lading, or receipts for the same, when in transit by cars or vessels to any such warehouseman, wharfinger or other person, shall be negotiable, and may be transferred by indorsement and delivery of said receipt or bill of lading; and any person to whom the said receipt or bill of lading may be so transferred, shall be deemed and taken to be the owner of the goods, wares and merchandise therein specified, so as to give security and validity to any lien created on the same, subject to the payment of freight and charges thereon; and no property on which such lien may have been created, shall be delivered by said warehouseman, wharfinger or other person, except on the surrender and the cancellation of said original receipt or bill of lading; or, in case of partial sale or release of the said merchandise, by the written assent of the holder of said receipt or bill of lading, indorsed thereon; provided, that all warehouse receipts or bills of lading, which shall have the words, "not negotiable," plainly written or stamped on the face thereof, shall be exempt from the provisions of this act.

SEC. 2. *No receipt to be given unless the goods have been actually received.*—No warehouseman, wharfinger or other person, shall issue any receipt or voucher for any goods, wares, merchandise, petroleum, grain, flour or other produce or commodity, to any person or persons, purporting to be the owner or owners thereof, unless such goods, wares, merchandise, petroleum, grain, flour or other produce or commodity, shall have been actually received into store, or upon the premises of such warehouseman, wharfinger or other person, and shall be in store, or on the premises aforesaid, and under his control, at the time of issuing such receipt.

SEC. 3. *Duplicate receipts to be so indorsed.*—No warehouseman, wharfinger or other person shall issue any second or duplicate receipt for any goods, wares, merchandise, petroleum, grain, flour or other

produce or commodity, while any former receipt for any such goods, wares, merchandise, petroleum, grain, flour or other produce or commodity as aforesaid, or any part thereof, shall be outstanding and uncalled, without writing across the face of the same, "duplicate."

SEC. 4. *Property not to be disposed of, without return of receipt.*—No warehouseman, wharfinger or other person shall sell or incumber, ship, transfer, or in any manner remove beyond his immediate control, any goods, wares, merchandise, petroleum, grain, flour or other produce or commodity, for which a receipt shall have been given him as aforesaid, whether received for storage, shipping, grinding, manufacturing or other purposes, without the return of such receipt.

SEC. 5. *Penalty for violation of the provisions of this act.*—Any warehouseman, wharfinger or other person, who shall violate any of the foregoing provisions of this act, shall be deemed guilty of fraud; and upon indictment and conviction, shall be fined in any sum not exceeding one thousand dollars, or imprisoned in one of the state prisons of this state, not exceeding five years or both; and all and every person or persons aggrieved by the violation of any of the provisions of this act, may have and maintain an action at law, against the person or persons violating any of the foregoing provisions of this act, to recover all damages which he or they may have sustained by reason of any such violation as aforesaid, before any court of competent jurisdiction, whether such person shall have been convicted of fraud as aforesaid, under this act, or not.

SEC. 6. The provisions of the foregoing act shall apply to grain stored in grain elevators, and to petroleum in barrels, stored or kept in places designated by law; and the owners or lessees of any of said elevators or places designated as aforesaid, shall have the rights and powers, and be subject to the obligations and penalties as therein provided, in regard to warehousemen, wharfingers, or other persons.

Act 24 Sept. 1866, extending the provisions of said act to grain stored in elevators, and to petroleum, repealed by the act 28 March 1870, P. L. 41.

SEC. 7. *Attachment of goods in the hands of bailees regulated, holder of receipt to be deemed garnishee, dissolution of attachment.*—Whenever any goods, wares, or merchandise shall have been, or shall hereafter be attached, by writ of foreign or other attachment, in the hands, possession or custody of any warehouseman, wharfinger or other person, who shall have issued for the same any warehouse receipt or voucher, or any bill of lading or other receipt, when in transit by car or vessel, which warehouse receipt, voucher, bill of

lading or other receipt, shall have been negotiated and transferred by indorsement or delivery, as provided in the act to which this is a supplement, the holder of any such warehouse receipt, voucher, bill of lading or other receipt, to whom the same shall have been transferred or delivered as aforesaid, although not named or summoned in, or served with such writ of attachment, shall nevertheless be deemed and taken to all intents to be a garnishee of the said goods, wares, or merchandise attached in the said writ as if the same were in his hands or possession; and the name of the holder of such warehouse receipt, voucher, bill of lading or other receipt shall, upon application to the court wherefrom such writ has issued, be added to the record of the action as a garnishee of the said goods, wares, or merchandise; and thereupon the said court shall, upon the motion of the said garnishee, grant a rule upon the plaintiff in such attachment to appear before the court at the time and place in such rule named, and there show cause why the attachment of such goods, wares, or merchandise should not be dissolved, or the proceeds thereof, if the same shall have been sold by the order of the said court, paid to the holder of such warehouse receipt, voucher, bill of lading or other receipt, upon his giving security as such garnishee, by recognizance and sufficient sureties to be approved by the court, or by one of the judges thereof in vacation, with condition that so much of the said goods, wares, or merchandise, or of the proceeds thereof, after the sale of the whole or any part thereof, as shall remain after the settlement or payment thereout, of the amount of any lien upon the said goods, wares, or merchandise created by the advance of money or credit by the said holder of such warehouse receipt, voucher, bill of lading or other receipt, transferred or delivered as aforesaid, and also of all prior liens for storage, freight and other charges, shall be retained in the hands of the said garnishee, to answer, if the plaintiff shall have execution of any judgment of the effects of the defendant in the action attached as aforesaid, or to abide the further order of the said court.

SEC. 8. *Bailees not to be liable, when the property is taken from them by legal process.*—Where goods, wares, or merchandise shall be taken from the possession of any warehouseman, wharfinger, carrier, or other bailee by writ of attachment, replevin, or other legal process, such warehouseman, wharfinger, carrier or other bailee shall not be liable therefor to the owner of such goods, wares or merchandise, or to the holder of any receipt, voucher or bill of lading given for the same; saving and reserving, however, to such owner or holder all legal remedies for the recovery of the said goods, wares or

merchandise from any person unlawfully detaining the same, or for the recovery of damages against any person unlawfully taking the same.

RHODE ISLAND.

[Public Statutes of 1882, page 332.]

§ 2. *Qualified ownership of goods for certain purposes and in hands of certain persons.*—Every person intrusted with and in the possession of goods for the purpose of sale, or of any bill of lading, receipt, or certificate of a warehouse-keeper or inspector, or of any warrant or order for the delivery of goods, shall be deemed the true owner of the goods so by him possessed or described in either of said instruments in favor of the purchaser or pledgee of such goods for money or negotiable security, provided such purchaser or pledgee at the time of payment or advance as aforesaid shall have had no notice or knowledge that the possessor of such goods or instrument was not the true owner of such goods by him possessed or in such instrument described.

TEXAS.

[Sayles's Civil Statutes, 1888.]

ART. 278. *Carriers cannot limit their responsibility.*—Railroad companies and other common carriers of goods, wares and merchandise for hire, within this State, on land or in boats or vessels on the waters entirely within the body of this State, shall not limit or restrict their liability as it exists at common law, by any general or special notice, or by inserting exceptions in the bill of lading or memorandum given upon the receipt of the goods for transportation, or in any other manner whatever, and no special agreement made in contravention of the foregoing provisions of this article shall be valid. (Act December 4, 1863; 10 Leg., p. 7.)

ART. 280. *Must give bill of lading.*—Common carriers are required, when they receive goods for transportation, to give to the shipper, when it is demanded, a bill of lading or memorandum in writing, stating the quantity, character, order, and condition of the goods; and such goods shall be delivered in the manner provided by common law, in like order and condition to the consignee, the unavoidable wear and tear and deterioration in due course of transportation only excepted; and in case such common carriers shall fail to deliver goods as above required, they shall be liable to the party injured for his damages, as at common law; and in case of their

refusal to execute and deliver a bill of lading or memorandum in writing, as above required, they shall be liable to a penalty of not less than five nor more than five hundred dollars, to be recovered as in the preceding article. (Act February 4, 1860; 8 Leg., p. 38.)

ART. 283. *Shall forward in good order.*—Where common carriers receive goods for transportation into their warehouses or depots, they shall forward them in the order in which they are received, the first received to be the first forwarded, without giving the preference to one over another, and in case they shall fail to do so, they shall be liable, absolutely, for all losses occurring while the goods remain, and for all damages occasioned or in anywise resulting from the delay; provided, that the trip or voyage shall be considered as having commenced from the time of the signing of the bill of lading, and the liability of the common carrier shall attach, as at common law, from and after such signing. (Act February 4, 1860; 8 Leg., p. 38.)

VIRGINIA.

[Code of 1887, Chapter LV.]

SEC. 1295. *Liability of carrier for loss or injury to goods.*—When a common carrier accepts for transportation anything directed to a point of destination beyond the terminus of his own line or route, he shall be deemed thereby to assume an obligation for its safe carriage to such point of destination, unless, at the time of such acceptance, such carrier be released or exempted from such liability by contract in writing, signed by the owner or his agent; and, although there be such contract in writing, if such thing be lost or injured, such common carrier shall himself be liable therefor, unless, within a reasonable time after demand made, he shall give satisfactory proof to the consignor that the loss or injury did not occur while the thing was in his charge.

SEC. 1296. *What agreement by carrier invalid.*—No agreement made by a common carrier for exemption from liability for injury or loss occasioned by his own neglect or misconduct shall be valid.

WISCONSIN.

[Sanborn and Berryman's Annotated Statutes, 1889.]

SEC. 4194. *Transferree of warehouse receipt, etc., deemed owner.*—Warehouse receipts, bills of lading, or railroad receipts given for any goods, wares, merchandise, lumber, timber, grain, flour, or other produce or commodity stored, shipped or deposited with any ware-

houseman, wharfinger, vessel, boat or railroad company, or other person, on the face of which shall not be plainly written the words "not negotiable," may be transferred by delivery, with or without indorsement thereof; and any person to whom the same may be so transferred shall be deemed and taken to be the owner of the goods, wares, and merchandise therein specified, so far as to give validity to any pledge, lien, or transfer made or created by such person or persons; but no such property shall be delivered, except on surrender and cancellation of said original receipt or bill of lading, or the indorsement of such delivery thereon, in case of partial delivery.

Sec. 6, ch. 340, 1860, as amended by sec. 6, ch. 73, 1863, slightly condensed.

Sec. 4424. *False receipts by warehouseman, vessel master, railroad officer, etc.*—Any warehouseman, wharfinger, master of a vessel or boat, or any officer, agent, or clerk of any railroad, express, or transportation company, who shall issue any receipt, bill of lading, voucher, or other document, to any person purporting to be the owner thereof, or as security for any loan or indebtedness, for any goods, wares, merchandise, lumber, timber, grain, flour, or other property, produce, or commodity, unless at the time of issuing the same such property shall have been actually received or shipped according to the terms and meaning of such receipt, bill of lading, voucher, or other document, without the consent of the holder thereof, or who shall deliver any such property or any part thereof, except to the person holding such receipt, bill of lading, voucher, or other document, and upon the surrender and cancellation thereof, or in case of any partial delivery of such property, upon the indorsement thereon of such partial delivery, unless required by legal process, or shall issue any second or duplicate receipt, or bill of lading, for any such property, while any former receipt, or bill of lading, for any such property, or any part thereof, shall be outstanding and uncancelled without writing across the face thereof the word "duplicate," shall be punished by imprisonment in the state prison not more than three years nor less than one year, or by imprisonment in the county jail not more than one year, or by fine not exceeding one thousand dollars.

Sec. 4425. *Warehouse receipts, negotiability of.*—Any such receipt, bill of lading, voucher, or other document as is mentioned in the preceding section, shall be transferable by delivery thereof, without indorsement or assignment, and any person to whom the same is so transferred shall be deemed and taken to be the owner of the property therein specified, so far as to give validity to any pledge,

lien, or transfer made or created by such person, unless such receipt, bill of lading, voucher, or other document, shall have the words "not negotiable," plainly written or stamped on the face thereof.

SEC. 4428. *False bill of lading.*—Any owner of any ship, steamboat, or vessel, or of any property laden, or pretended to be laden, on board the same, or any other person concerned in the lading or fitting out of any such ship, steamboat, or vessel, who shall make out or exhibit, or cause to be made out or exhibited, any false or fraudulent invoice, bill of lading, bill of parcels, or other false estimates of any goods or property, laden or pretended to be laden on board such vessel, with intent to injure or defraud any insurer of such vessel or property, or of any part thereof, shall be punished by imprisonment in the state prison not more than three years nor less than one year, or by fine not exceeding one thousand dollars nor less than three hundred dollars.

TABLE OF CASES.

[REFERENCES ARE TO THE SECTIONS.]

A.

SECTION

Abbe *v.* Eaton, 51 N. Y. 411 25, 31, 364
Acatos *v.* Burns, 47 L. J. (N. S.) 2 Q. B. 566 283, 286, 287
Ackerman *v.* Redfield, 9 Hun (N. Y.), 378 378
Ackley *v.* Kellogg, 8 Cow. (N. Y.) 223 197
Adams *v.* Crosby, 2 Nov. Scot. Law Rep. (R. & G.) 331 165
Adams Ex. Co. *v.* Boskowitz, 107 Ill. 660 64, 77, 80
v. Fendrick, 38 Ind. 150 114, 272
v. Guthrie, 9 Bush (Ky.), 78 117
v. Haynes, 42 Ill. 89 153
v. Loeb, 7 Bush (Ky.), 499 117
v. Nock, 2 Duv. 562 117, 127
v. Reagan, 29 Ind. 21 114, 387, 393
v. Sharpless, 77 Pa. St. 516 133, 226
v. Stettaners, 61 Ill. 184 113, 142, 153
v. Wilson, 81 Ill. 339 329
Adone *v.* Seeligeon, 54 Texas, 593 491
Ætna Ins. Co *v.* Wheeler *et al.*, 49 N. Y. 616 337, 350
Agnew *v.* The Contra Costa, 27 Cal. 425 217
Alabama Gt. South. R. R. Co. *v.* Little, 71 Ala. 611 105

SECTION

Alabama, etc., R. R. Co. *v.* Thomas' Sons, 83 Ala. 343 105, 329
Alden *v.* Pearson, 3 Gray (69 Mass.), 342 227
Alderman *v.* Eastern R. R. Co., 115 Mass. 233 480, 485, 528
Aldridge *v.* Great Western R. Co., 15 C. B. N. S. 582 339
Alexander *v.* Green, 7 Hill (N. Y.), 533 261
Allen *v.* Chisholm, 38 Upper Canada Q. B. 237 375
v. Coltart, L. R. 11 Q. B. D. 782 355
v. Michigan Cent. R. Co., 79 Me. 327 533
v. Sewall, 2 Wend. (N. Y.) 327 9, 39, 178
Allen *v.* Williams, 12 Pick. 297 479, 491, 496, 510, 516, 518, 521
Alsager *v.* Dock Co., 14 M. & W. 798 359
Alston *v.* Herring, 11 Exch. 822 243, 244, 245
Amer. Ex. Co. *v.* Greenhalgh, 80 Ill. 68 382
v. Haggard, 37 Ill. 465 8
v. Lesem, 39 Ill. 312 173–382
v. Perkins, 42 Ill. 458 21, 38
v. Sands, 55 Pa. St. 140 102, 133, 144
v. 2d National Bank of Titusville, 19 Smith, 69 Pa. 394 133, 337
v. Smith, 33 O. St. 511 200, 289

SECTION

Amer. Ex. Co. *v.* Wettstein, 28 Ill. App. 96 382
American Ins. Co. *v.* Bryan, 1 Hill (N. Y.), 25; S. C. 26 Wend. (N. Y.) 563 206, 211, 320
American Ins. Co. *v.* Dunham, 12 Wend. (N. Y.) 463 206
Am. Merc. Union Ex. Co. *v.* Phillips, 29 Mich. 515 254
Am. Merc. Union Ex. Co. *v.* Schier, 55 Ill. 140 150, 153, 382
Am. Merc. Union Ex. Co. *v.* Wolf, 79 Ill. 430 382
Am. Trans. Co. *v.* Moore, 5 Mich. 368 (S. C. Mich.); 7 Am. Law Reg. O. S. 352 155, 161, 165, 232
Ames *v.* St. P. R. R. Co., 12 Minn. 412 162
Amies *v.* Stevens, 1 Str. 128 190, 295
Anchor Line *v.* Dater, 68 Ill. 369 113, 153
v. Knowles, 66 Ill. 150 150, 153
Anderson *v.* Clark, 2 Bing. 20 492
Andrews *v.* Roach, 3 Ala. 590 79
Anonymous *v.* Jackson, Peake's Add. Cas. 183 100
Arbuckle *v.* Thempen, 1 Wright (Pa.), 170 (see case 475, 476) 411, 471, 476
Arcangelo *v.* Thompson, 2 Camp. 620 206
Archer *v.* The Adriatic, 9 Cent. L. Jour. 201 49
Ardan Steamship Co. *v.* Theband, 35 Fed. Rep. 620 73
Arend *v.* Liverpool, etc., Stm. Co., 64 Barbour (N Y.), 118; S. C. 6 Lans. (N. Y.) 457 49, 252
Armentrout *v.* St. L., K. C. & N. R. Co., 1 Mo. App. 158 235, 472
Armour *v.* Michigan Cent. R. R. Co., 65 N. Y. 111 168, 434
Armstrong *v.* G. & T. Rlw. Co., 2 P. & B. 445 336
Arnold *v.* Jones, 26 Tex. 335 64, 65
v. Potter, 22 Iowa, 194 92
v. Prout, 51 N. H. 587 471
Arrayo *v.* Currell, 1 La. Rep. 528 98
Arthur *v.* St. Paul, etc., R. Co., 38 Minn. 95 400
Ashmore *v.* Penn. Stm. S. Trans. Co., 4 Dutcher (N. Y.), 180 71, 130

SECTION

A. & T. R. R. Co. *v.* Kidd, 29 Ala. 221 169
Atchison, etc., R. R. Co. *v.* Washburn, 5 Neb. 117 102, 126, 127
Atkinson *v.* Ritchie, 10 East, 530 306
Atlantic Insur. Co. *v.* Storrow, 5 Paige (N. Y.), 285 320
Atwell *v.* Miller, 11 Md. 357 68
Atwood *v.* Reliance Transportation Co., 9 Watts (Pa.), 87 133, 268
Audenreid *v.* Randall, 3 Clifford, 99 420, 480, 533
Angle *v.* Miss. & Mo. R. R. Co., 9 Iowa, 487 329
Aus *v.* Kempf, 10 Benedict's Repts. (U. S. D. C.) 231 45
Austin *v.* Drew, 4 Camp. 360 225
v. Manchester, etc., R. R. Co., 10 C. B. 454; S. C. 16 Q. B. 600 100
v. Manchester, etc., Railway Co., 21 L. J. C. P. 179; S. C. 10 C. B. 453; 16 Jur. 763; 7 Ry. Cas. 300 264
v. Talk, 20 Tex. 164 49, 136
Australasia Ins. Co. *v.* Jackson, 3 Esp. Mar. Law Ca. (N. S.) 26 206
Australasia, etc., Nav. Co. *v.* Morse, L. R. 4 P. C. 222 288
Ayers *v.* Western R. Co., 14 Blatchford (U. S. C. C.), 9 150, 157
Aymar *v.* Astor, 6 Cow. 266 271, 272, 298

B.

Babcock *v.* L. S. & M. S. R. R. Co., 49 N. Y. 491 75, 332, 343, 350
v. May, 4 Ohio, 346 64
Backhouse *v.* Sneed, Murph. (N. C.) 173 192
Bags of Linseed, 1 Black, 108, 112 73, 359
Bailey *v.* Hudson River R. R. Co., 49 N. Y. 70 474, 502
Baker *v.* Bruison, 9 Rich. (S. C.) 201 134, 252
v. Michigan, etc., R. R. Co., 42 Ill. 73 113
v. Mo. Pac. Ry. Co., 19 Mo. App. 321 328

SECTION

Baker *v.* Steamboat Milwaukee, 14 Iowa, 214 164
Baldwin *v.* Collins, 9 Robinson, 468 118
v. L. & G. W. S. S. Co., 74 N. Y. 125 35
Balfour *v.* Wilkins, 5 Sawyer (C. C.), 429 69
Ballentine *v.* Northern Missouri R. R. Co., 40 Mo. 491 190
B. & L. H. Ry. Co. *v.* Gordon, 16 U. C. (Q. B.) 283 362
B. & O. R. R. Co. *v.* Brady, 32 Md. 333 101, 120, 155
B. & O. R. R. Co. *v.* Green, 25 Md. 72 323–328
B. & O. R. R. Co. *v.* McWhinney, 36 Ind. 436 414
Baltimore, etc., R. R. Co. *v.* Morehead, 5 W. Va. 293 194
B. & O. R. R. Co. *v.* Rathbone, 1 W. Va. 87 139, 260
B. & O. R. R. Co. *v.* Schumacker, 29 Md. 168 328
B. & O. R. R. *v.* Skeels, 3 W. Va. 556 139
Baltimore, etc., R. R. Co. *v.* Wilkins, 44 Md. 11 15, 167, 180, 345, 432, 454
Baltimore, etc., Stm. Boat Co. *v.* Brown, 4 P. F. Smith, 54 Penna. 77 70, 170, 323, 325, 331, 345
Bancroft *v.* M. D. T. Co., 47 Iowa, 262 350
v. Peters, 4 Mich. 619 24, 82
Bank of Commerce *v.* Bissell, 72 N. Y. 615 398, 414
Bank of Green Bay *v.* Dearborn, 115 Mass. 219 496, 504, 505, 511
Bank of Kentucky *v.* Adams Ex. Co., 1 Flippin, 242, Supreme Court, 93 U. S. 174; 3 Otto, 174 103, 229, 324
Bank of Rochester *v.* Jones, 4 N. Y. 497 479, 491, 496, 497, 516, 518, 521, 522
Bankard *v.* B. & O. R. Co., 34 Md. 197 120
Barber *v.* Brace, 3 Conn. 9 13, 84, 239, 250, 253
v. Meyerstein, L. R. 4 H. L. 317 418
v. Taylor, 5 M. & W. 527 422

SECTION

Barclay *v.* Clyde, 2 E. & D. Smith (C. P. N. Y.) 95 328
v. Circulla, 3 Doug. 389 294
Bark Edwin, 1 Sprague, 477 180
Barker *v.* Havens, 17 Johnson (N. Y.), 234 369
Barnard *v.* Campbell, 58 N. Y. 73; 55 N. Y. 456 535, 540, 542
Barrett *v.* Rogers, 7 Mass. 297 47, 48
v. I. St. Louis R. R. Co., 9 Mo. App. 226 328, 329
Barry *v.* Louisiana Ins. Co., 11 Mait. La. 630 210
Barter *v.* Wheeler, 49 N. H. 9; 10 Am. Law Reg. N. S. 194 23, 94, 127, 230, 345
Barton *v.* Wolleford, Comb. 56 (3 Jac. II.) 269, 271, 292
Bass *v.* Glover, 63 Ga. 745 397
Batavia Bank *v.* N. Y., etc., R. Co., 106 N. Y. 195 168, 428, 434, 515, 516
Bates *v.* Tood, 1 Moody & Robinson, 106 (Eng. N. P.) 26
Baxendale *v* Great Eastern Ry. Co., 38 L. J. Q. B. 137; 4 L. R. Q. B. 244; 17 W. R. 412; 10 B. & S. 212 100
Baxter *v.* Leland, 1 Abbot Adm. Rep. (N. J. Dist. Ct.) 348; 1 Blatchf. 526 55, 243, 273, 322
Bazin *v.* Steamship Co., 3 Wall. Jr., 229 198, 275
Bean *v.* Green, 12 Me. 422 119, 160
Beale *v.* Pettit, 1 Wash. C. C. 241 419
Beard *v.* Ill. Cent. R. Co., 44 N. W. (Iowa) 800 241
v. Steele, 34 U. C. Q. B. 43 180, 409
Bearse *v.* Ropes, 1 Sprague, 331 243, 267, 269
Beek *v.* Evans, 16 East, 244 100
Becker *v.* Hallgarten, 86 N. Y. 167 496, 501, 533, 538, 540, 541 542
Beekman *v.* Shouse, 5 Rawle, 179 133
Beel *v.* Mitchell, 48 Ga. 533 49
Belger *v.* Dinsmore, 51 N. Y. 166 8, 39, 129, 150
Bell *v.* Read, 4 Binn. Pa. 127 188, 194

SECTION

Bell *v.* Wood, 1 Dana (Ky.), 146 176, 183
Benjamin *v.* Levy, 39 Minn. 11 461
Bennett *v.* Filyaw, 1 Fla. 403 111, 329
Berg *v.* A. T. & St. F. R. R. Co., 30 Kas. 561 340
Berkley *v.* Watling, 7 Adolph & Ellis, 29 15, 25, 428, 429
Berry *et al. v.* Cooper *et al.*, 28 Ga. 543 160
Betts *v.* Farmers' Loan & Trust Co., 21 Wis. 80 217, 140
Bever *v.* Tomlinson, Easter Term, 36 Geo. III., Abbott on Shipping, p. 290 (10th ed.) p. iv., ch. vi. 184, 274
Bickett *v.* Willan, 2 B. & A. 356
Bickford *v.* Herr, 18 Lower Canada Jurist (Q. B.), 169 367
Biddle *v.* Bond, 6 Best & S. 225 468
Bingham *v.* Rogers, 6 Watts & Sergeant, 495 133
Bird *v.* Asteock, 2 Bulst. 280 190, 247
v. Cromwell, 1 Mo. 58 278, 286
Birkett *v.* Willan, 2 B. & A. 356 194
Bishop *v.* Empire Trans. Co., 48 How. Pr. 119; 33 N. Y. Supr. Ct. 99 63, 150, 362, 397
Bissell *v.* Campbell, 54 N. Y. 353 31, 82
v. Michigan R. R. Co., 22 N. Y. 258 323
v. Price, 16 Ill. 408 14, 48, 343
v. Steel, 67 Penn. 443 502
Black *v.* Goodrich Trans. Co., 55 Wis. 319 140
v. Rose, 2 Moore P. C. (N. S.) 277 378
Blackburne on Sales, 297 424
Blackstock *v.* New York & Erie R. R. Co., 20 N. Y. 48 312
Blade *v.* C. St. P. & F. du L. R. R. Co., 10 Wis. 4 51
Blagg *v.* Phœnix Ins. Co., 3 Wash. C. C. 5 418, 419
Blaikie *v.* Steinbridge, 6 C. B. N. S. 894 243
Blaine *v.* Maller, 2 Juta's Rep. Cape Good Hope E. D. 133 45
Blair *v.* Erie R. R. Co., 66 N.Y. 313 129
Blanchard *v.* Page, 8 Gray, 281 25, 368

SECTION

Blanchet *v.* Powers Colliery Co., 9 L. R. Exch. 74; 43 L. J. Exch. 50; 22 W. R. 490; 30 L. T. N. S. 28 27
Bland *v.* Adams Express Co., 1 Duv. (Ky.) 232 293
Blight *v.* Page, 3 B. & P. 295 306, 308
Bliven *v.* Hudson, etc., R. R. Co., 36 N. Y. 403; 35 Barb. 188 300, 301
Block *v.* Erie & North Shore Despatch Fast Freight Line, 21 Am. & Eng. R. R. Cas. 1 345
Blocker *v.* Whittenburg, 12 La. Ann. Rep. 410 285
Blodgett *v.* Abbott, 72 Wis. 516; S. C. 40 N. W. Rep. 491 69, 196
Blossom *v.* Champion, 37 Barb. 554; 28 ib. 217 461, 463, 465, 538
v. Dodd, 43 N. Y. 264 129, 151
v. Griffin, 13 N. Y. 569 79
Blower *v.* Great Western R'y Co., 7 L. R. C. P. 655; S. C. 20 W. R. 776 218
Blum *v.* The Caddo, 1 Woods, 64 472
Blumenthal *v.* Brainerd, 38 Vt. 402 137
Boatman's Saving Bank *v.* West, etc., R. Co., 81 Ga. 221 414, 516
Boggs *v.* Martin, 13 B. Mon. (Ky.) 239 375
Bohannon *v.* Hammond, 42 Cal. 227 192
Bonanno *v.* Boskenna Boy, 36 Fed. Rep. 697 196
Bond *v.* Frost, 6 La. Ann. Rep. 801 49
v. The Cora, 2 Pet. Adm. 373 197
Boon *v.* St'mb't Belfast, 40 Ala. 184 81, 271, 294
Boorman *v.* Am. Ex. Co., 21 Wis. 152 144, 151
Boscowitz *v.* Adams Ex. Co., 5 Cent. L. Jour. 58 37
v. Adams Ex. Co., 93 Ill. 523 113, 144, 153, 158
v. Adams Exp. Co., 45 Georgia, 305
Boston, etc., R. R. Co. *v.* Shanley, 107 Mass. 568 246

SECTION

Bostwick *v.* Baltimore, etc., R. R. Co., 45 N. Y. 712, reversing the judgment in 55 Barb. 137 67, 150, 151, 197, 269

v. Champion, 11 Wend. (N. Y.) 571 345

Boutflower *v.* Wilmer, 2 Selwyn's Nisi Prius, 96 (21 Geo. II.) 208

Bowman *v.* Kennedy (S. C. of Pa.), 1 Am. Law Reg. (O. S.) 119 344

v. Teale, 23 Wend. N. Y. 306 190, 194

Boyce *v.* Anderson, 2 Pet. 150 201

v. Welch, 5 La. Ann. Rep. 623 269

Boyd *v.* Du Bois, 3 Camp. 133 281

Boyle *v.* McLaughlin, 4 H. & J. (Md.) 291 191, 192

Bradley *v.* Dunipace, 1 H. & C. 521; 7 H. & N. 200; 32 L. J. Exch. 22 259, 400, 409

Fertilizer Co. *v.* The "Edwin L. Morrison," 40 Fed. Rep. 501 269

Bradstreet *v.* Heron, 2 Blatchf. 116, 209; Abbott's Ad. 209 14, 45, 47, 398

Brand *v.* Focht, 1 Abb. App. 185 420

Brandt *v.* Bowlby, 2 B. & Ad. 932 480, 499

Brass *v.* Maitland, 6 El. & Bl. 470 243

Brauer *v.* Barque "Almoner," 18 La. Ann. Rep. 266 251

Breed *v.* Mitchell, 48 Ga. 533 49

Brehme *v.* Adams Ex. Co., 25 Md. 328 120, 142, 144, 150

Bridden *v.* Great Northern R. W. Co., 28 L. J. Exch. 51 190, 195

Brig May Queen, Newberry's Adm., U. S. D. C. 464 59

Briggs *v.* B. & L. R. R. Co., 6 Allen (88 Mass.), 246 360

v. Vanderbilt, 19 Barb. N. Y. 222 345

Brintnall *v.* S. & W. R. R. Co., 32 Vt. 665 328, 333, 346

Bristol & Exeter Ry. *v.* Collins, 7 House of Lords, 197 349

SECTION

Brittan *v.* Barnaby, 21 Howard, 527 (U. S. C. C.)

Britton *v.* Aymar, 23 La. Ann. Rep. 63 295

12, 157, 378, 412

Broadwell *v.* Butler, 6 McLean, 296 352

v. Butler, 1 Newb. 171; S. C. 6 McLean, 296 273

Brock *v.* Gale, 14 Fla. 523 111

Brodenham *v.* Bennet, 4 Price, 31 194

Brooke *v.* N. Y., L. E. & W. R. R. Co., 16 W. N. C. 514; S. C. 108 Pa. St. 529, 530 99, 168

v. Pickwick, 4 Bing. 218 35, 194, 434

Brooks *v.* Am. Ex. Co., 14 Hun, N. Y. 364 382

Brousseau *v.* Ship Hudson, 11 La. Ann. Rep. 427 188, 192, 201, 223, 224, 243

Brown *v.* Adams Ex. Co., 15 W. Va. 812 102, 139

v. Camden & Atlantic R. R. Co., 83 Penna. St. 316 89

v. Clayton, 12 Ga. 564 286

v. Delano, 12 Mass. 373 297, 411

v. Eastern R. R. Co., 11 Cushing, 97 121

v. Lamont, 30 Upper Canada Q. B. 392 190

v. Mott, 22 Ohio St. 149 336

v. Peabody, 13 N. Y. 121 465, 467

v. Powell Coal Co., L. R., 10 C. P. 362 428, 429, 430

v. Railway, 54 N. H. 535 388

v. Spoffard, 95 U. S. 474 70

v. Union Ins. Co., 5 Day Ct. 1 206

Bruce *v.* Andrews, 36 Mo. 593 479

v. Nicholopulo, 24 L. J. Ex. 321 308

v. Wait, 3 Mees. & W. 15 491

Brunswick *v.* U. S. Express Co., 46 Iowa, 677 414

Brush *v.* S. A. & D. R. R. Co., 43 Iowa, 554 115

Bryan *v.* M. P. R. R. Co., 11 Bush (Ky.), 597 325, 327

Bryans *v.* Nix, 4 M. & W. 775, 791 491, 492

SECTION

Bryant *v.* Southwestern R. R. Co., 68 Ga. 805 343
Bryden *v.* Niebuhr, 1 C. & E. 241 74
Buckland *v.* Adams Ex. Co., 97 Mass. 124 121, 151, 152, 161, 333
Buffett *v.* T. & B. R. R. Co., 40 N. Y. 168 323
Buffington *v.* Curtis, 15 Mass. 528 496
Bulkley *v.* Naumkeag Steam Cotton Co., 24 How. 386 192, 203, 223, 224, 272, 411
Buller *v.* Fisher, 3 Esp. 67; Abbott on Shipping, p. 289 (10th Am. ed.) 203, 213, 276
v. Fisher, Peake's Ad. Cas. K. B. 183 192, 203
Bullock *v.* Toay Anny, 24 Cal. W. R. C. R. 74 216, 317
Burghall *v.* Howard, 1 H. Bl. 366 532
Burroughs *v.* Grand Trunk R. R. Co., 32 Am. & Eng. R. Cas. 467 350
v. Grand Trunk R. Co., 34 N. W. Rep. 875 235
v. N. & W. R. R. Co., 100 Mass. 26 175, 328
Burtis *v.* B. & St. L. R. R. Co., 24 N. Y. 269 323
Burton *v.* Wilkinson, 18 Vt. 186 300
Bush *v.* St. L. K. C. & N. Ry. Co., 3 Mo. App. 62 414
Bussey *v.* M. & L. R. R. Co., 4 McCrary (D. C.), 405 325
Butler *v.* Smith, 6 George, 457 476
Byrne *v.* Weeks, 4 Abb. Dec. (N. Y.) 657 375

C.

Cafiero *v.* Welsh, 8 Phila. Rep. 130 13, 14, 19
Cain *v.* Garfield, 1 Lowell, 483 400
Caldwell *v.* Ball, 1 Tenn. 205 493
Calhoun *v.* Fitzsimmons, 1 Binn. (Pa.) 293, 321 206
C. & A. R. R. Co. *v.* Baldauf, 16 Pa. St. 67 35, 37, 133
C. & A. R. R. Co. *v.* Bausch, 6 Cent. Rep. 121 64

SECTION

C. & A. R. R. Co. *v.* Benjamin, 63 Ill. 283 47, 49
C. & A. R. R. Co. *v.* Forsyth, 61 Pa. St. 81 328, 350
C. & A. R. R. Co. *v.* Thompson, 19 Ill. 578 38, 39
C. & A. R. & T. Co. *v.* Burke, 13 Wend. (N. Y.) 611 9
Camp *v.* H. N. Y. Stm. Co., 43 Conn. 333; also reported 3 Law & Eq. Rep. 515 100, 109
Campbell *v.* Allford, 57 Texas, 159 496
v. Morse, Harp. L. R. 468 194
C. & T. R. R. Co. *v.* Kidd, 29 Ala. 221 69
Candee *v.* P. R. R. Co., 21 Wis. 582 327
Canfield *v.* Northern R. R. Co., 18 Barb. (N.Y.) 586 343, 364, 370
Cannan *v.* Meaburn, 1 Bing. 243 276
Canning *v.* Brown, 9 East, 509 491, 537
Cantu *v.* Bennet, 39 Texas, 303 93, 136
Cape Hart *v.* S. & R. R. Co., 81 N. C. 438 131, 390
Carey *v.* Atkins, 6 Ben. 562 252
Carr *v.* Austin, etc., R. Co., 4 Wood, 327 357
v. Lancashire, etc., Ry. Co., 7 Exch. 712, 707 100, 217
v. Steamboat Michigan, 27 Mo. 196 352
Carson *v.* Harris, 4 Greene (Iowa), 516 45, 49, 343
Carter *v.* Peck, 4 Sneed (Tenn.), 203 329
Case *v.* Hartford Ins. Co., 13 Ill. 676 225
Cassilay *v.* Young, 4 B. Mon. (Ky.) 265 351
Caulkins *v.* Hellman, 47 N. Y. 449 472
Cayuga Bank *v.* Daniels, 47 N. Y. 631 486, 496, 502, 519, 521
Center *v.* Torry, 8 Martin's La. Rep. 206 64
Central Line of Boats *v.* Lowe, 50 Ga. 509 192, 201, 202, 203
Cent. R. Co. *v.* Avant, 80 Ga. 195 339
Central R. R. & B. Co. *v.* Anderson, 58 Ga. 393 28, 170

SECTION

Central R. & Banking Co. *v.* Smith & Chastain, 85 Ala. 47 105
Cent. Trust Co. *v.* Wabash, etc., R. R. Co., 39 Fed. Rep. 417 40
Certain Logs of Mahogany, 2 Sumner (U. S. C. C.), 589 73, 378
Chadwick *v.* Denniston, 41 Fed. Rep. 58 204
Chalk *v.* Charlotte, etc., R. R. Co., 85 N. C. 423 225, 226
Champion *v.* Bostwick, 18 Wend. (N. Y.) 175 345
Chandler *v.* Fulton, 10 Texas, 2 533, 544
v. Sprague, 46 Mass. 306 480
Chapin *v.* Chicago, etc., Ry. Co. (Iowa), 44 N. W. Rep. 820 188
Chappel *v.* Comfort, 31 L. J. C. P. 58; 8 Can. Law Jour. (O. S.) 138 250, 356
Chartered Bank *v.* Henderson, L. R. 5 P. C. 501 543
Chartier *v.* G. T. Ry. Co., 17 Low. Can. Jur. 26 340
Chase *v.* Westmore, 5 M. & S. 180 359
Chester Nat. Bank *v.* Atlantic & R. Co., 25 S. C. 216 414, 516
Chevallier's Adm'r *v.* Patton, 10 Texas, 344 86
Chevallier *v.* Straham, 2 Texas, 115 188, 192, 223, 224
C. H. & D. D. & M. R. R. Co. *v.* Pontius, 19 Ohio St. 221 150, 326, 339
Chicago & Aurora R. R. Co. *v.* Thompson, 19 Ill. 578 21
Chicago, St. L. & N. O. R. R. Co. *v.* Abels, 60 Miss. 1017 124
Chicago, etc., R. R. Co. *v.* Montfort, 60 Ill. 175 113, 153
Chicago, etc., R. R. Co. *v.* Moss, 60 Miss. 1003 124, 227, 228
Chicago, etc., R. R. Co. *v.* People, 56 Ill. 365 329
Chicago, etc., R. R. Co. *v.* Shea, 66 Ill. 471 20, 21
Chickering *v.* Fowler, 21 Mass. (4 Pick.) 371 400
Ching Hong & Co. *v.* Seng Moh & Co., 3 L. R. 4 Col. Ser. 736 223
Chippendale *v.* Lancashire, etc., R. R. Co., 7 Railway Canal Cas. 824 100

SECTION

Chippendale *v.* Yorkshire, etc., Ry. Co., 15 Jur. 1106; S. C. 21 L. J. Q. B. 22; 7 Ry. Cas. 824 217, 264
Choate *v.* Crowinshield 3 Clifford, C. C. Rep. 184 47, 49
Chouteaux *v.* Leech, 18 Pa. St. 224 133, 159, 200, 278, 285, 286
v. St. Anthony, 11 Mo. 226 178
Chopin *v.* Clark, 31 La. Ann. Rep. 846 480, 519
Christenson *v.* Am. Ex. Co. 15 Minn. 270 123, 129, 150, 338
Christie *v.* The Craigton, 41 Fed. Rep. 62 269
City Bank *v.* Rome & R. R. Co., 44 N. Y. 136 496
Citizens' Insurance Co. *v.* The Kountz Line, 4 Wood's Rep. 268 345
City Ins. Co. *v.* Corlies, 21 Wend. 367 225
Clark *v.* Barnwell, 12 Howard, 272 47, 55, 243, 269, 322
v. Faxton, 21 Wend. 153 129
v. Pacific R. R. Co., 39 Mo. 184 295, 296
Clarke *v.* Gray, 6 East, 564 100
v. Great Western Ry. Co., 8 U. C. C. P. 191 491
v. R. & S. R. R. Co., 14 N. Y. 570 217
v. Rochester Ry. Co., 4 Kern. 570 217
Clay *v.* Willan, 1 H. Bl. 298 100
Close *v.* Beatty, 28 U. C. C. P. 470 400, 405
Clyde *v.* Hubbard, 7 Norris (Pa.), 358 325, 327, 328
Coal and Oil Co. *v.* H. & St. J. R. R. Co., 35 Mo. 84 327
Coates *v.* U. S. Exp. Co., 45 Mo. 238 328, 329
Cobb *v.* Blanchard, 11 Allen, 93 Mass. 409 73, 83
Cochran *v.* Dinsmore, 49 N. Y. 249 225, 228
Coffin *v.* Newburyport Ins. Co., 9 Mass. 436 197
Coggs *v.* Bernard, 2 Ld. Raymond, 909 189, 294
Cohen *v.* Southeastern Ry. Co., L. R. 2 Ex. D. 253 2, 261, 265

SECTION

Cohen *v.* Southern Express Co., 45 Ga. 148 329
Colburn *v.* Arbuckle & Thompson, 1 Wright, 170 476
Cole *v.* Goodwin, 19 Wend. (N. Y.) 251 20, 37, 129
Coleman *v.* Riches, 16 C. B. 103 29 Eng. L. & Eq. 323 167, 180, 428, 429
Colgate *v.* Pennsylvania Co., 102 N. Y. 120 449
Collender *v.* Dinsmore, 55 N. Y. 200 64, 69, 382
Collier *v.* Swinney, 16 Mo. 484 192
v. Valentine, 11 Mo. 299 269, 275
Collins *v.* Burns, 4 J. & Sp. 518 414
v. B. & E. R. Co., 11 Ex. 790; 1 H. & N. 517; 7 H. of L. Cases, 194 325
v. Union Trans. Co., 10 Watts (Pa.), 384 369, 370
Colt *v.* McNechin, 6 Johns. (N. Y.) 160 190
Colton *v.* Cleveland, etc., R. R. Co., 67 Pa. St. 211 133, 223, 228
Commercial Bank *v.* Pfeiffer, 22 Hun, 327 510
Compart *v.* Stmr. Prior, 2 Fed. Rep. 819 60
Conard *v.* Atlantic Ins. Co., 1 Pet. 445 479, 493, 494, 516, 533
Condict *v.* Grand Trunk R. R. Co., 54 N. Y. 500; 4 Lansing, N. Y. 106 226, 325, 326, 335
Congar *v.* Chicago & Galena R. Co., 17 Wis. 477 329, 471
Conger *v.* Hudson River R. R. Co., 6 Duer (N. Y.), 375 217, 220
Conkey *v.* Milwaukee & S. Paul Ry Co., 31 Wisc. 619 343
Consequa *v.* Willings, Peters, C. C. 225 99
Conturier *v.* Hastie, 5 H. L. C. 673 418
Convers *v.* Brainard, 27 Conn. 607 212, 215
Converse *v.* N. & N. Y. Co., 33 Conn. 166; 6 Am. Law. Reg., N. S. 214 (S. C. of Conn.) 323, 328, 345
Cook *v.* Commercial Ins. Co., 11 Johns. (N. Y.) 40 208
v. Gourdin, 2 Nott. & M. (S. C.) 19 194

SECTION

Cooper *v.* Berry, 21 Ga. 526 38, 69, 80
Coosa River Stm. Co. *v.* Barclay, 30 Ala. 120 2
Cope *v.* Cordova, 1 Rawle (Pa.), 202, 211 1, 398, 400
Coke *v.* Doherty, 4 Jurist, N. S. 699 215
Cornwall *v.* Wilson, 1 Ves. 509 521
Cory *v.* Robinson, Lowdnes on General Average, p. 42 239
Coulthurst *v.* Sweet, 1 L. R. C. P. 649 49, 373
Courtois *v.* Carpentier, 1 Wash. C. C. 376 99
Covas *v.* Bingham, 2 C. L. R. 212; 2 El. & Bl. 836; 18 Jur. 596; 23 L. J. Q. B. 26 31
Covell *v.* Hitchcock, 23 Wend. 611 537
Coventry *v.* Gladstone, L. R. 4 Eq. 493; L. R. 6 Eq. 44 523, 544
v. G. E. R. Co., 11 Q. B. D. 776 168
Covill *v.* Hill, 4 Denio (N. Y.), 323 2
Covington *v.* Willan, Gow. 115 100
Cowley *v.* Davidson, 13 Minn. 92 273
Cox *v.* Foscue, 37 Ala. 505 351
v. Peterson, 30 Ala. 608 14, 65, 192, 223, 272, 273
v. Star Nav. Co. (Mit. Mar. Reg., 2 June) 203
Coxe *v.* Heisley, 7 Harris (Penna.), 243 38, 40
Coxon *v.* G. W. R. Co., 5 H. & N. 274 325
Cragin *v.* N. Y., etc., R. R. Co., 51 N. Y. 61 129, 217, 240, 254
Craig *v.* Childress, Peck, 270 135, 200
Cramer *v.* A. M. U. E. Co. & M. D. Co., 56 Mo. 524 328, 329
Cranwell *v.* The Fannie Fosdick, 15 La. Ann. Rep. 436 243
Craven *v.* Ryder, 6 Taunt. 433 462, 465
Crawford *v.* S. R. Assn., 51 Miss. 222 327, 328
Creery *v.* Holly, 14 Wend. (N. Y.) 26 3, 64, 68, 85
Crenshawe *v.* Pearce, 37 Fed. Rep. 432 16
Crosby *v.* Fitch, 12 Conn. 410 185, 197
v. Grinnell, 9 N. Y. Leg. Obs. 281 269

SECTION

Cross *v.* O'Donnell, 44 N. Y. 661 472
Crouch *v.* G. W. R. Co., 2 H. & N. 491 325
Crousillat *v.* Ball, 4 Dall. 294 205, 207, 209
Crow *v.* Falk, 8 A. & E. N. S. 467 304
Cullen *v.* Butler, 1 Stark. 138; S. C. 5 M. & S. 461 274
Currell *v.* Johnson, 12 La. Rep. 290 45
Curry *v.* Roulstone, 2 Overt. 111 533
Cutts *v.* Brainerd, 42 Vt. 566 323, 325, 328
Czech *v.* General Steam Navigation Co., L. J. 37 C. P. 3; S. C. L. R. 3; C. P. 14 203, 253
C. & C. A. R. R. Co. *v.* Marcus, 38 Ill. 219 38
C. & M. W. Ry. Co. *v.* Montfort, 60 Ill. 175 329
C. & N. W. R. R. Co. *v.* Ames, 40 Ill. 249 409
C. & N. W. R. R. Co. *v.* N. L. Packet Co., 70 Ill. 217 63, 333
C. & S. W. R. R. Co. *v.* N. W. U. Packet Co., 38 Iowa, 377 358

D.

D'Arc *v.* London, etc., Ry. Co., 9 L. R. C. P. 325 261
Da Costa *v.* Edmunds, 4 Camp. 142 250
Daggett *v.* Shaw, 3 Mo. 189 215, 269, 272
Dale *v.* Hall, 1 Wils. R. 281 294, 298
Darling *v.* Boston, etc., R. R., 11 Allen (Mass.), 295 328
Dart *v.* Ensign, 47 N. Y. 619 367
Dauchy *v.* Silliman, 2 N. Y. S. C. (Lansing) 361 262
Davenport Bank *v.* Homlyer, 45 Mo. 145 496
Davis *v.* Aubin, 24 Vt. 55 491
v. Garrett, 6 Bing. 716 194, 197
v. Wabash & R. R. Co., 89 Mo. 340 190
Davidson *v.* Burnand, L. R. 4 C. P. 117 270
v. City Bank, 57 N. Y. 81 364
v. Graham, 2 Ohio State, 131 132

SECTION

Davidson *v.* Gwynne, 12 East, 381 283, 381
Day *v.* Ridley, 16 Vt. 48 200
Dean *v.* King, 22 Ohio St. 119 26, 32, 167, 432
Dedekaur *v.* Vose, 3 Blatchf. 44 243, 321
Dederer *v.* Delaware Ins. Co., 2 Wash. C. C. 61 206, 209
Degitz *v.* Holland, 6 Chicago Legal News, 224 (Marine Ct. N. Y.) 129, 150
Deming *v.* G. T. R. R. Co., 48 N. H. 455 174
De Moet *v.* Laraway, 14 Wend. (N. Y.) 225 192, 203
Dennis *v.* C. C. & B. R. R. Co., 51 Iowa, 338 410
Denny *v.* New York Central R. R. Co., 13 Gray (Mass.), 481 196
Denton *v.* C., R. I. & P. R. R. Co., 52 Ia. 161 228
Depeyster *v.* Columbian Ins. Co., 2 Caines, 85 299
De Rothchild *v.* Royal Mail Steam Packet Co., 21 L. J. Ex. N. S. 273; S. C. 7 Exch. 734; 14 Eng. L. & Eq. 327 216, 319
Derwort *v.* Loomer, 21 Conn. 245 109
Detroit R. Co. *v.* Farmer's Bank, 20 Wis. 127 151
De Villers *v.* Schooner John Bell, 6 La. Ann. Rep. 544 325, 331
Dibble *v.* Brown, 12 Ga. 217 7, 10
v. Morgan, 1 Woods, 406, 407, 411 194, 201, 267, 301, 400, 412
Dillard *v.* Louisville, etc., R. R. Co., 2 Lea (Tenn.), 288 101, 102, 135, 150
Dillon *v.* N. Y. & E. R. R. Co., 1 Hilt. (N. Y.) 231 328
Directors B. & E. R. R. Co. *v.* Collins, 7 H. L. Cas. 194 326
Dixon *v.* C. & I. R. R. Co., 4 Bissell's Rep. 137 64
v. Reid, 3 B. & Ald. 597; S. C. 1 D. & R. 207 206, 291
v. Richmond and Danville R. R. Co., 74 N. C. 538 347
v. Sadler, 9 L. J. Ex. 48 269
Doane *v.* Keating, 15 Leigh (Va.), 391 70, 85

SECTION

Dodson *v.* Grand Trunk Ry Co., 7 Canada, L. J. N. S. 263; S. C. of Nova Scotia 100
Don *v.* Lippman, 5 Cl. & F. 1 90
Dorsey *v.* Smith, 4 La. 211 88, 273
Douglass *v.* People's Bank, 32 Am. & Eng. R. Cases, 510; S. C. 5 Southwaite Rep. 420 517
Dorr *v.* N. J. Stm. Nav. Co., 11 N. Y. 485 129
Dows *v.* Exch. Bank, 1 Otto, 618 484, 485, 487, 489, 510, 521
v. Greene, 16 Barb. N. Y. 72; 32 Barb. 490; 24 N. Y. 638 2, 159, 533, 534, 538,
v. Perrin 16 N. Y. 325 461, 533
v. Rush, 28 Barb. 157 2, 534, 538
Draysen *v.* Horne, 32 L. T. N. S. 691; 23 W. R. 793 150
Drew *v.* Red Line Trans. Co., 3 Mo. App. Rep. 495 11, 102
Droege *v.* Stuart, L. R. 2 P. C. 505 288
Dunlop *v.* International Steamboat Co., 98 Mass. 371 36
Dunn *v.* Branner, 13 La. Ann. Rep. 453 11, 63
Dunseth *v.* Wade, 2 Scammon (Ill.), 285 197, 351
Durbrow *v.* McDonald, 5 Bosw. 130 542
Dwight *v.* Brewster, 18 Mass. 50 260
Dwyer *v.* Gulf, etc., R. Co., 69 Texas, 707 397
Dyke *v.* Erie Railway, 45 N. Y. 113 91
D. & B. C. Ry. Co. *v.* McKenzie, 43 Mich. 609 328
D. & M. R. Co. *v.* Farmers & Mechanics' Bank, 20 Wis. 122 140, 157, 340

E.

Earle *v.* Rowcroft, 8 East, 126 206, 209
Earnest *v.* Exp. Co., 1 Woods, 573 38, 39, 103
E. & C. R. R. Co. *v.* Androscoggin Mills, 22 Wall. 594 (U. S. S. C.); 32 Leg. Int. 355 323, 326

SECTION

E. & C. R. R. Co. *v.* Young, 28 Ind. 516 114
E. T. R. R. Co. *v.* Nelson, 1 Cold. (Tenn.) 272 135, 329, 343
E. Tenn. R. R. Co. *v.* Rogers, 6 Heisk. (Tenn.) 143 327, 329
East Tennessee, etc., R. R. Co. *v.* Whittle, 27 Ga. 535 217, 220
East Tenn., etc., R. R. Co. *v.* Wright, 76 Ga. 532 112, 269
E. T., Va. & Ga. R. R. Co. *v.* Brumley, 5 Lea (Tenn.), 401 150, 340
East T., Va. & Georgia R. Co. *v.* Johnson, 75 Ala. 596 105
E. W. T. Co. *v.* Dater, 91 Ill. 195 158
Edsall *v.* C. & A. R. & T. Co., 50 N. Y. 661 129
Edwards *v.* Sherral, 1 East, 604 294
v. Str. "Cohawba," 14 La. Ann. Rep. 224 253
v. White Line Transit Company, 104 Mass. 159 303
Ela *v.* Express Co., 29 Wis. 611 414, 477, 480
Elkins *v.* Empire Trans. Co., 2 W. N. C. (Penna. S. Ct.) 403 34, 75
Ellershaw *v.* Magniac, 6 Ex. 569 482, 529
Elliot *v.* Rossell, 10 Johns. 1 188
Ellis *v.* Willard, 9 N. Y. 529 47, 376
Ellsworth *v.* Tartt, 26 Ala. 733 345
Elmore *v.* Naugatuck R. R. Co., 23 Conn. 457 328
Elwell *v.* Skiddy, 77 N. Y. 282 367
Empire Trans. Co. *v.* Wamsutta, etc., Co., 63 Pa. St. 14 133
English *v.* Ocean Stm. Nav. Co., 2 Blatchf. C. C. Rep. 425 62
Erb *v.* G. W. R. R. Co., 42 U. C. Q. B. 90, 5 Duval (Canada S. C.), 179; affirming 3 Tupper (Cent. App.), 456 167, 428, 429
v. Keokuk Packet Co., 43 Mo. 53 25
Erie Dispatch *v.* Jackson, 87 Tenn. 490 144
Erie R. R. Co. *v.* Lockwood, 28 O. St. 350, 358 226, 228, 348
Erie R. R. Co. *v.* Wilcox, 84 Ill. 239 113, 153, 223, 329
Esposito *v.* Bomden, L. J. 27 Q. B. 17 306

SECTION

Evans *v.* Atlanta & West Point R. R. Co., 56 Ga. 498 52
v. Dunbar, 117 Mass. 546 222
v. Fitchburg R. R. Co., 111 Mass. 142 217
v. Hutton, 4 M. & G. 954 306
v. Marlett, 1 Ld. Raymond, 271 493
v. Nicholl, 4 Scott N. R. 43 491
Evansville R. R. Co. *v.* Burne, 55 Tex. 323 136
Everleigh *v.* Sylvester, 2 Brev. (S. C.) 178 191, 192
Everett *v.* Saltus, 15 Wend. 474 471
v. Southern Ex. Co., 37 Ga. 688; 46 ib. 303 38, 39
Everth *v.* Hannam, 6 Taunt. 375 206, 209
Ewart *v.* Street, 2 Bailey (S. C.), 157 193
Exchange Bank *v.* Rice, 107 Mass. 37 513
Exchange Shipping Co. *v.* Dixon, L. R. 12 App. Cases, 11; 56 L. J. Q. B. 266; 35 U. R. 461 81
Ex parte Bonner, L. R. 2 Ch. 278 485
Ex parte Davis, L. R. 13 Ch. D. 628 547
Express Co. *v.* Caldwell, 21 Wallace, 267 103, 104, 386, 389
v. Hunnicutt, 54 Miss. 566 388
v. Kountze, 8 Wall. 342 103, 295
Ezell *v.* English, 6 Porter, 311 105, 480
v. Miller, 6 Port. 307 105

F.

Fairchild *v.* Slocum, 19 Wend. (N. Y.) 329 268
Falkenberg *v.* Clark, 11 R. I. 279 157
Falkenau *v.* Fargo, 3 Jones & Sp. (N. Y. Supr. Ct.) 332 150
Falvey *v.* Georgia R. Co., 76 Ga. 597 329
v. N. Y. Co., 15 Wis. 129 151, 161
Farina *v.* Horne, 16 M. & W. 119 424

SECTION

Farmers' Bank *v.* Logan, 74 N. Y. 568 427, 510
Farmers', etc., Bk. *v.* Champlain T. Co., 18 Vt. 131; S. C. 23 Vt. 186 137, 328
Farmers and Mechanics' Bk. *v.* Erie Ry. Co., 72 N. Y. 188 461
Farmers & Mechanics' Nat. Bk. *v.* Hazeltine, 78 N. Y. 104 531
Farnham *v.* C. & A. R. R. Co., 55 Penna. 53 102, 133, 150, 223, 228
Farrant *v.* Barnes, 11 C. B. N. S. 553 246
Fassett *v.* Ruark, 3 La. Ann. Rep. 694 20, 54
Fatman *v.* Cincinnatti, etc., R. R. Co., 2 Disney, 248 198
Faulkner *v.* Hart, 82 N. Y. 413; S. C. 37 Am. Rep. 574 94, 223, 348
Fay *v.* Alliance Ins. Co., 16 Gray, 455 400, 402
Fearn *v.* Richardson, 12 La. Ann. Rep. 752 15, 180, 181
Fearon *v.* Bowers, 1 H. Bl. 364; 1 Sm. Ldg. Cases, p. 782 455, 458
Feige *v.* Mich. Cent. R. Co., 62 Mich. 1 400
Feinberg *v.* D. L. & W. R. Co. (N. J.), 20 Atl. Rep. 33 194
Feital *v.* Middlesex R. R. Co., 109 Mass. 398 323
Fellows *v.* Stm. P. W. Powell, 16 La. Ann. Rep. 316 180, 432
Fenton *v.* Braden, 2 Cranch C. C. 550 472
Ferguson *v.* Brent, 12 Md. 9 188, 192, 193, 267, 273, 275
v. Cappeau, 6 Harris & Johnson (Md.), 394 176
v. Domville, 3 P. & B. (New Brunswick Reps.) 576 364, 397
Fibel *v.* Livingston, 64 Barb. 179 129, 151
Field *v.* Chicago, etc., Ry., 71 Ill. 458 113, 153, 329, 339
Fifth National Bank *v.* Bayley, 115 Mass. 228 511
Fillebrown *v.* Grand Trunk R. R. Co., 55 Me. 462 119
Finlay *v.* Liverpool, etc., Steamship Co., 23 L. T. N. S. Exch. 251 300, 304

SECTION

Finn *v.* West R. R. Corp., 112 Mass. 524 165
First Nat'l Bk. Cairo *v.* Crocker, 111 Mass. 163 479, 516, 518, 519, 521
First Nat. Bk. *v.* Dearborne, 115 Mass. 219 491
First National Bank *v.* Kelly, 57 N. Y. 34 510
First Nat. Bk. Memphis *v.* Pettit, 9 Heisk. 447 533
First National Bank of Toledo *v.* Shaw, 61 N. Y. 283 90
Fish *v.* Chapman, 2 Georgia, 349 37, 100, 185, 201
v. Clark, 49 N. Y. 122 10
Fisk *v.* Newton, 1 Denio, 45 198
Fitzgerald *v.* Adams Exp. Co., 24 Indiana, 447 42
Fitzhugh *v.* Wyman, 9 N. Y. 559 14, 64
Fleming *v.* Marine Ins. Co., 3 W. & S. (Pa.) 144 273
v. Mills, 5 Mich. 420 2
Fletcher *v.* Gillespie, 3 Bing. 635 243
v. Inglis, 2 B. & Ala. 315 269, 275
Flierboom *v.* Chapman, 13 M. & W. 230 286
Flinn *v.* Phila., etc., R. R. Co., 1 Houston, 469 111
Flower *v.* Downs, 12 Robinson (La.), 101 17, 414
Forbes *v.* B. & L. R. R. Co., 133 Mass. 154 426, 427
Forepaugh *v.* Del., etc., R. R. Co., 6 Pa. County Ct. Rep. 228 133
Forsythe *v.* Walker, 9 Barr, 148 414, 415
Forward *v.* Pittard, 1 T. R. 27 190, 192, 223, 294, 295
406 "Hogsheads of Molasses," 4 Blatch. 319 372
Fowler *v.* Cooper, 3 Louisiana, 215 476
v. Davenport, 21 Texas, 626 136, 201, 266
v. L. & G. W. Stm. Co., 23 Hun, N. Y., 196 9
v. Meikelham, 7 Lower Canada (Q. B.), 367 364, 496
v. Stirling, 3 L. C. Jurist, 103 (Supr. Ct.) 14

SECTION

Fox *v.* Boston, etc., R. R. Co., 148 Mass. 220 325
v. Holt, 36 Conn. 558 176
v. Nott, 6 H. & N. 637 442
Foy *v.* T. & B. R. R. Co., 24 Barb. (N. Y.) 382 328, 339
Fragano *v.* Long, 4 B. & C. 219 15
Frank *v.* Adams Ex. Co., 18 La. Ann. Rep. 279 228
v. Hoey, 128 Mass. 163 472
Freeburg Coal Co. *v.* U. R. T. Co., 10 Mo. App. 596 328, 329
French *v.* Buffalo, etc., R. R. Co., 4 Keyes, N. Y. 108; S. C. 2 Abb. App. Dec. 196 129, 260
Friedlander *v.* Texas, etc., R. R. Co., 130 U. S. 416 167, 180, 428
Friend *v.* Woods, 6 Gratt. (Va.) 189 188, 191, 192, 266
Fuin *v.* Western R. R. Co. 259
Furman *v.* Union Pacific Ry. Co., 106 N. Y. 579 414
F. & W. R. R. Co. *v.* Hanna, 6 Gray (72 Mass.), 539 345

G.

Gabay *v.* Lloyd, 3 B. & C. 793 222, 269
Gage *v.* Jaqueth, 1 Lansing, N. Y. 207 2, 67
v. Morse, 12 Allen (Mass.), 410 356, 413
v. Tirrell, 9 Allen (Mass.), 299 186, 292
Gaines *v.* U. T. Co., 28 Ohio State, 418 132, 156, 161
Gaither *v.* Barnet, 2 Brevard (S. C.), p. 488 184
Gallin *v.* L. & N. W. R. R. Co., L. R. 10 Q. B. 212 100
Galt *v.* Archer, 7 Gratt. (Va.) 307 200
Gannell *v.* Ford, 5 L. T. N. S. 604 217, 257
Gardner *v.* Trechmann, L. R. 15 Q. B. D. 154 74
Garey *v.* Meagher, 33 Ala. 630 178
Garrigues *v.* Cone, 1 Binney (Pa.), 592 298
Garrison *v.* Memphis Ins. Co., 19 How. 312 223, 272
Gass *v.* New York, etc., R. R. Co., 99 Mass. 220 345
Gatliffe *v.* Bourne, 4 Bing. N. C. 314 223

SECTION

Gauche *v.* Storer, 14 La. Ann. Rep. 411 45, 378, 400
Gavarron *v.* Kreeft, L. R. 10 Exch. 274 529
Geipel *v.* Smith, L. R. 7 Q. B. 404 306, 307
G. & B. R. Nav. Co. *v.* Marshall, 48 Ind. 596 295, 353
Georgia R. R. Co. *v.* Beatie, 66 Ga. 438 112
Georgia R. R. Co. *v.* Gann, 68 Ga. 350 112, 346
Georgia R. R. Co. *v.* Spears, 66 Georgia, 485 101, 112
German *v.* Chicago, etc., R. R. Co., 38 Ia. 127 115, 261
Germania Fire Ins. Co. *v.* M. & C. R. Co., 72 N. Y. 90; 7 Hun (N. Y.), 233 65, 150, 151, 223
Germania Fire Insurance Co. *v.* The Lady Pike, 17 Am. Law Reg. (O. S.) 614; S. C. 2 Bissell, 141 190
Germania Ins. Co. *v.* La Crosse, etc., Co., 3 Bissell, 501 400
Gibbon *v* Michael's Bay Lumber Company, 7 Ontario, 746 80
Gibbon *v.* Paynton, 4 Burr. 2298 39
Gibbons *v.* Farwell, 63 Mich. 344 414
Gibson *v.* Amer. Merch. Union Ex. Co., 3 N. Y., S. C. 501 150
Gibson *v.* Caruthers, 8 M. & W. 337 532
v. Stevens, 8 How. 384 493
Giglio *v.* Britannia, 31 Fed. Rep. 432 253
Gill *v.* Manchester, etc., R. R. Co., L. R. 8 Q. B. 186 220, 345
Gillespie *v.* Thompson, 2 Jur. N. S. 713 n.; S. C. 6 El. & B. 477 n.; 36 Eng. L. & Eq. 227 243
Gillet *v.* Ellis, 11 Ill. 579 190
Gilmore *v.* Carman, 1 Sm. & M. Miss. 279, 303 9, 223, 272
Gilson *v.* Madden, 1 Lansing (N. Y.), 172 368
Giraudel *v.* Mendiburne, 3 Martin's La. Rep., N. S. 509 65
Glass *v.* Goldsmith, 22 Wisc. 488 14, 27
Gleadell *v.* Thomson, 56 New York, 194 400, 402
Gledstanes *v.* Allen, 12 C. B. 202 74
Glenister *v.* Great Western R. R. Co., 22 W. R. 72; 29 L. T. N. S. 423 100

SECTION

Glenn *v.* Southern Ex. Co., 86 Tenn. 594 135
Glidden *v.* Lucas, 7 Cal. 26 496
Glynn *v.* East and West India Dock Co., L. R. 7 App. 591; 6 Q. B. D. 475; 1 H. Bl. 364; 11 Q. B. Div. 327 427, 442, 455, 457, 466, 495
Goddard *v.* Malloy, 52 Barb. (N. Y.) 87 197
Goggin *v.* K. R. R. Co., 12 Kan. 416 116, 387
Goldey *v.* Penn. R. R. Co., 30 Pa. St. 242 133
Goldschmidt *v.* Whitmore, 3 Taunt. 508 206, 208
Goodman *v.* Harvey, 4 Ad. & E. 870 453
v. Simonds, 20 How. 343 453
v. Stewart, Wright (Ohio), 216 359
Goodrich *v.* Norris, 1 Abbott, 196 15, 25
v. Thompson, 44 N.Y. 324 198
v. Thompson, 4 Rob. N. Y. 75 170
Gordon *v.* Buchanan, 5 Yerger, Tenn. 71 9, 268, 275
v. Great Western R. W. Co., 25 Upper Canada (C. P.) Rep. 488; 34 W. C. Q. B. 224 325, 331, 348, 350
v. Remington, 1 Camp. 123 225
v. Ward, 16 Mich. 360 165
Gorham Mfg. Co. *v.* Fargo, 45 How. Pr. 90 35
Gosling *v.* Higgins, 1 Camp. 451 305
Gott *v.* Dinsmore, 111 Mass. 45 121
Gould *v.* Chapin, 10 Barb. N.Y. 612 343
Gould *v.* Hill, 2 Hill (N. Y.), 623 129, 223
v. Oliver, 4 Bing. N. C. 134; 2 M. & G. 208 239, 249, 250
Gowdy *v.* Lyon, 9 B. Mon. (Ky.) 112 46
Grace *v.* Adams, 100 Mass. 505 121, 150, 151, 159, 223
Gracie *v.* Palmer, 8 Wheaton, 605 360
Graff *v.* Foster, 67 Mo. 512 472
Graham *v.* Davis, 4 Ohio St. 362 132

SECTION

Graham *v.* Hille, 10 Bom. H. C. Rep. 60 251
v. Penna. Ins. Co., 2 Washington, C. C. 113 17
Grand Trunk Railway Co. *v.* Atwater, 18 Lower Canada Jurist. 53 347
Grant *v.* Norway, 10 C. B. 187, 665; 2 Eng. L. & Eq. 337 15, 167, 180, 428, 429
Gray *v.* Carr, L. R. 6 Q. B. 522 74
v. Jackson, 51 N. H. 9 94, 329
v. Mo. River Packet Co., 64 Mo. 47 374
Great Northern R. R. Co. *v.* Morville, 7 Railway & Canal Cas. 830 100
Great Nor. R. R. Co. *v.* Shepherd, 14 Eng. L. & Eq. Rept. 367 38
Great Northern Railway Co. *v.* Swaffield L. R., 9 Exch. 132, 136 285
Great Western Railway Co. *v.* Blower, 20 W. R. 776; L. R. 7 C. P. 665 217, 246
G. W. R. Co. *v.* Crouch, 3 H. & N. 183 325
Great Western R. R. Co. *v.* Hawkins, 18 Mich. 427 217, 256
G. W. R. Co. *v.* McDonald, 18 Ill. 172 48, 344
G. T. R. Co. *v.* Fitzgerald, 5 Duval (Canada), 204 173
Green & Barren River Nav. Co. *v.* Marshall, 48 Ind. 596 353, 404
Green *v.* Elmslie Peaks, N. P. C. 278 (34 Geo. III.) 274, 296
v. Sichel, 7 C. B. N. S. 747; 6 Jur. (N. S.) 827; 29 L. T. (C. P.) 213; 8 W. R. (C. P.) 663 371
v. Southern Exp. Co., 45 Ga. 305 37
Grey's Executors *v.* Mobile Trans. Co., 55 Ala. 387 105, 226
Griffith *v.* Ingledew, 6 Serg. & Rawle, 429 471, 475, 476
Grill *v.* Iron Screw Colliery Co., Limited, L. R. 3 C. P. 476; L. R. 1 C. P. 600; S. C. 12 Jur. N. S. 727; 35 L. J. C. P. 321; 14 W. R. 893; affirmed, L. R. 3 C. P. 476 205, 212, 273
Griswold *v.* Haven, 25 N. Y. 604 434

SECTION

Grosvenor *v.* Phillips, 2 Hill, 147 491, 492
Grove *v.* Brien, 8 How. 439 471, 473
Guillaume *v.* H. & A. Packet Co., 42 N. Y. 212 129
Gulf, etc., Ry. Co. *v.* Trawick, 68 Tex. 314 136
Gullischein *v.* Stewart Brothers, L. R. 13 Q. B. D. 317 74
Gulliver *v.* Adams Ex. Co., 38 Ill. 503 8
Gurney *v.* Behrend, 3 El. & Bl. 622 523, 527, 533

H.

Hadd *v.* U. S. & E. Express Co., 52 Vt. 335 328
Haddow *v.* Parry, 3 Taunton, 303 (Eng. C. P.) 54
Hahn *v.* Corbett, 2 Bing. 205 269, 274, 296
Haille *v.* Smith, 1 B. & P. 563 472, 491, 492, 504
Hale *v.* Barrett, 26 Ill. 195 362
v. New Jersey S. N. Co., 15 Conn. 539 109, 192, 223
v. Steam Nav. Co., 15 Conn. 539 203
Hall *v.* Cheney, 36 N. H. 26 201, 223, 294
v. Eastwick, 1 Lowell, 456 355
v. G. T. R. Co., 34 Up. Can. Q. B. 517 25
v. Mayo, 7 Allen (89 Mass. 454), 25, 26, 167
v. Pennsylvania R. R. Co., 14 Philadelphia, 414; S. C. 37 Legal Intelligencer, 64; Lawson on Contracts of Carriers, p. 419 228, 316
v. Renfro, 3 Mete. (Ky.) 51 10, 127, 220
v. Ship Chieftain, 9 Louisiana, 318 183, 479
Hallett *v.* Columbian Ins. Co., 8 Johns. (N. Y.) 272 210
Hallgarten *v.* Oldham, 135 Mass. 1 505, 506, 507
Halliday *v.* Hamilton, 11 Wall. 560 436, 533
Halsey *v.* Warden, 25 Kan. 128 519
Hamilton *v.* Pandorf, L. R. 12 App. Cases, 518 299

SECTION

Hamilton *v.* Railway Co., 23 U. C. Q. B. 600 100
v. West N. C. R. Co., 96 N. C. 398 67, 70
Hammack *v.* White, 31 L. J. C. P. 129 215
Hand *v.* Baynes, 4 Whart. Pa. 204 197, 277
Hansen *v.* Flint, etc., R. R. Co., 73 Wis. 346 170, 329
Harmon *v.* N. Y. & E. R. R. Co., 28 Barbour, 323; 65 N. Y. 111 24, 214, 166
Harmony *v.* Bingham, 12 N. Y. 99 194, 199
Harp *v.* The Grand Era, 1 Woods Rep. 185 346
Harrington *v.* McShane, 2 Watts, 443 384
v. Syles, 2 Nott. & McC. S. C. 88 191
Harris *v.* Edmonstone, 4 Low. Can. Jur. 40 100
v. Grand Trunk Ry., 15 R. I. 371 343
v. Northern, etc., R. R. Co., 20 N. Y. 232 217, 220
v. Packwood, 3 Taunton, 264 100
v. Rand, 4 N. H. 259 190, 199
Harrison *v.* Hixson, 4 Blackf. Ind. 226 266
v. Roy, 10 George, Miss. 396 9
Hart *v.* Allen, 2 Watts, Pa. 114 193
v. Penn. Railroad Co., 2 McCrary, 333 103
v. Rensselaer, etc., R. R. Co., 8 N. Y. 37 345
v. Ship Jane Ross, 5 La. Ann. Rep. 264 49
Hartness *v.* G. W. R. Co., 2 Brown (Mich.), 80 122, 155, 157
Hartwell *v.* North Pacific Ex. Co., 5 Dak. T. 463 154
Harvey *v.* Pike, N. C. Tenn. Rep. 82; S. C. J. A. Dec. 698 273
v. Rose, 26 Ark. 3 10
v. Terra Haute & Ind. R. R. Co., 74 Mo. 538 34
Hastings *v.* Pepper, 11 Pickering (Mass.), 41 44, 47
Hatch *v.* Tucker, 12 R. I. 501 364

SECTION

Hatchett *v.* The Compromise, 12 La. Ann. Rep. 783 273, 352
Hatfield *v.* Phillips, 9 M. & W. 649 424
Hausman *v.* Nye, 62 Ind. 485 479
Havelock *v.* Hancill, 3 T. R. 277 206
Hawkins *v.* G. W. R. R., 17 Mich. 57 217, 238, 256
Hayes *v.* Wells, 23 Cal. 185 39
Hayn *v.* Culleford, 48 L. J. Q. B. 372 243
Hays *v.* Kennedy, 41 Pa. St. 378; S. C. 3 Grant (Pa), 351 191, 201, 212, 213, 269
Hazard *v.* New England Marine Ins. Co., 1 Sumner, 218 299
Headrick *v.* V. & T. A. L. R. R. Co., 48 Ga. 545 232
Heineman *v.* G. T. R. R. Co., 31 How. Pr. (N. Y.) 430 71, 77, 129
Heiskell *v.* Farmers and Mechanics' Nat. Bank, 8 Norris, 155 414
Helliwell *v.* G. T. R. W. Co., 10 Bissell, 170 63, 65
Helsby *v.* Mears, 5 B. & C. 504 170
Henderson *v.* The Comptoir d'Escompt de Paris, 5 P. C. 260 505
Hendrick *v.* Virginia R. R. Co., 48 Ga. 545 36
Hendricks *v.* The Morning Star, 18 La. Ann. Rep. 353 199
Henley *v.* The Brooklyn Ice Co., 14 Blatchf. 522 412
Henry *v.* Philadelphia Warehouse Co., 81 Pa. St. 76 90
Hepburn *v.* Lee, 14 La. 76 479
Hermann *v.* Jorhrick, 21 Wis. 536 329
Herne *v.* Garton, 2 E. & E. 66 246
Herrick *v.* Gallagher, 60 Barbour (N. Y.), 566 384
Hibbert *v.* Martin, 1 Camp. 539 206
Hibernia Ins. Co. *v.* St. Louis Trans. Co., 5 McCrary, 397; 120 U. S. 166 269
Hibler *v.* McCartney, 31 Ala. 501 105, 223, 271
Hide *v.* Proprietors, 1 Esp. 36 100
Higgins *v.* New Orleans, etc., R. R. R. Co., 28 La. Ann. Rep. 133 118
v. U. S. M. S. S. Co., 3 Blatchf. (U. S. C. C.) 282 14, 64

SECTION

Hill *v.* B. C. R. & N. R. Co., 60 Iowa, 196 343, 344
v. Boston, etc., R. Co., 144 Mass. 284 260
v. Malkill, 36 Fed. Rep. 702 243
v. S. B. & N. Y. R. Co., 73 N. Y. 351; reversing S. C. 8 Hun, 296 65, 66, 129, 150, 151
v. Sturgeon, 28 Mo. 323 251, 268
v. Syracuse, B. & N. Y. R. R. Co., 8 Hun (N. Y.), 296 66
Hill Mfg. Co. *v.* B. & L. R. R. Co., 104 Mass. 122 36, 323, 325, 327, 329
Hill Manuf. Co. *v.* Providence Steamship Co., 113 Mass. 495 36
Hinckley *v.* N. Y. C. & H. R. R. Co., 56 N. Y. 429; 3 Thomp. & C. (N. Y.) 281 65, 333
Hinsdell *v.* Weed, 5 Denio (N. Y.), 172 375, 378
Hirsch *v.* Leathers, 23 La. Ann. Rep. 50 351
Hoadley *v.* N. T. Co., 115 Mass. 304 121, 150, 193, 196
Hoare *v.* Dresser, 5 Jurist. N. S. 371 530
Hobart *v.* Littlefield, 13 R. I. 341 472, 485, 490
Holbrook *v.* Vose, 6 Bosw. 76 537, 542
v. Wright, 24 Wend. 169 492
Holford *v.* Adams, 2 Duer (N. Y.), 471 374
Holladay *v.* Kennard, 12 Wall. 254 292, 293, 295
Hollister *v.* Nowlen, 19 Wendell (N. Y.), 234 10, 37, 38, 129
Holmes *v.* Bailey, 92 Penn. 57 496, 497
v. German Security B'k, 87 Pa. 525 496, 497
Holsapple *v.* R. W. & O. R. Co., 86 N. Y. 275 129
Home Ins. Co. *v.* W. T. Co., 51 N. Y. 93 411
Hong Kong, etc., Corp. *v.* Baker, 7 Bom. H. C. Rep. O. C. J. 203 231, 274
Hood *v.* Grand Trunk R'lway Co., 20 Upper Canada C. P. 361 217, 257
v. N. Y., etc., R. Co., 22 Conn. 502 328

SECTION

Hood's Ex'rs *v.* Nesbit, 2 Dallas, 137 207
Hooker *v.* Gormer, 2 Hilt. (N. Y.) 71 385
Hooper *v.* C. & N. W. Ry. Co., 27 Wis. 81 329, 343
v. Rathbone, Taney Dec. 519 269
v. Wells, Fargo & Co., 27 Cal. 11 107, 338
Hopkins *v.* Westcott, 6 Blatchford, 64 37
Horrell *v.* Parrish, 26 La. Ann. Rep. 6 63
Horseman *v.* G. T. R. R. Co., 31 U. C. Q. B. 535 32
Hosea *v.* McCrory, 12 Ala. 349 169, 178
Hostetter *v.* Baltimore, etc., R. R. Co., 11 Atl. Rep. (Pa.) 609 63, 64, 336
Howe *v.* Parker, 2 T. R. 376 460
Houston, etc., Nav. Co. *v.* Dwyer, 29 Texas, 376 192
Houston & T. C. R. R. Co. *v.* Burke, 55 Texas, 323 37, 136
Hovil *v.* Stephenson, 4 Car. & P. 469 243
How *v.* Kirchner, 4 Can. Law Jour. (O. S.) 121 359
Howard *v.* Shepherd, 9 C. B. 296 412, 440
v. Tucker, 1 Barn. & Ad. 712 428
Howland *v.* Greenway, 22 How. 491 305
Hoyt *v.* Sprague, 61 Barb. (N. Y.) 497 362
Hubbard *v.* Harnden Express Co., 10 R. I. 244, 251 133, 293
Hubbersty *v.* Ward, 8 Ex. 330; 18 Eng. La. & Eq. 551; 22 L. J. Exch. 113 15, 167, 180, 431
Hudson *v.* Baxendale, 2 Hurl. & N. 575 282
Humphreys *v.* Reed, 6 Whart. (Pa.) 435 275, 361, 378, 403
Hunnewell *v.* Taber, 2 Sprague, 1 103, 252
Hunt *v.* Miss. Cent. R. Co., 29 La. Ann. Rep. 446 15, 18, 167, 180, 432
v. Morris, 6 Martin (La.), 676 102
Hunter *v.* Potts, 4 Camp. 203 272, 298

SECTION

Hunter *v.* The Morning Star, Newfoundland, 270 223, 226
Hunter *v.* Wright, 12 Allen, 548 472
Huntingdon *v.* Dinsmore, 4 Hun (N. Y.), 66 63, 150, 166
Huntly *v.* Dows, 55 Barb. 310 356, 358
Hurkley *v.* N. Y. C. & H. R. R. R. Co., 3 Thomp. & C. (N. Y.) 281 261
Hutchings *v.* Ladd, 16 Mich. 493 172, 174, 382
Hutchinson *v.* Guion, 5 C. B. N. S. 149 246, 284
Hyde *v.* New York, etc., S. S. Co., 17 La. Ann. Rep. 29 22
Hyde *v.* Smith, 12 La. 144 491
v. Trent. Nav. Co., 5 T. R. 389 100, 223
Hyperion's Cargo, 2 Lowell, 93 356
H. & T. C. R. R. Co. *v.* Burke, 55 Texas, 323 38
H. & T. C. R. R. Co. *v.* Haines, 44 Texas, 628 190, 194

I.

Ibrahim Moosum *v.* B. I. S. N. Co., 8 Cal. W. Rep. C. R. 35 394
Ide *v.* Sadler, 18 Barbour, 32 64
Illesley *v.* Stubbs, 9 Mass. 65 537
Illinois, etc., R. R. Co. *v.* Adams, 42 Ill. 474 113, 239, 254
Illinois Cent. R. R. Co. *v.* Cobb, 72 Ill. 148 51
Illinois Cent. R. R. Co. *v.* Copeland, 24 Ill. 332 329
Illinois C. R. Co. *v.* Cowles, 32 Ill. 116 49, 329, 343
Illinois C. R. Co. *v.* Frankenberg, 54 Ill. 88 7, 113, 153, 329
Illinois Cent. R. R. Co. *v.* Hall, 58 Ill. 409 218, 238
Illinois Cent. R. R. Co. *v.* Johnson, 34 Ill. 389 325, 327, 329
Illinois, etc., R. R. Co. *v.* McClellan, 54 Ill. 58 280
Illinois, etc., R. R. Co. *v.* Morrison, 19 Ill. 136 113, 261
Illinois Cent. R. R. Co. *v.* Owens, 53 Ill. 391 190, 192
Illinois Cent. R. R. Co. *v.* Read, 37 Ill. 484 113
Illinois Cent. R. R. Co. *v.* Smyser, 38 Ill. 354 113, 223

SECTION

Independence Mills Co. *v.* Burlington, etc., R. Co., 72 Iowa, 535 343, 400
Independence Mills Co. *v.* Cedar Rapids, etc., R. Co., 72 Iowa, 535 400
Indiana Natl. Bk. *v.* Colgate, 4 Daly, 41 530
Ind. & Cin. R. R. Co. *v.* Remmy, 13 Ind. 518 64, 65
Indianapolis, etc., R. R. Co. *v.* Allen, 31 Ind. 394 114, 219, 255
Indianapolis, etc., R. Co. *v.* Cox, 29 Ind. 360 114
Indianapolis & St. Louis R. R. Co. *v.* Juntgen, 10 Ill. App. 295 315
Ingalls *v.* Brooks' Ed. Sel. Cases, 104 197
Inhabitants *v.* Hall, 61 Me. 517 336
In re Westinthus, 5 B. & Ad. 817 545, 546, 547
Ins. Co. *v.* Sherwood, 14 How. 365 248, 269
Insurance Co. of North America *v.* St. Louis, etc., R. R. Co., 3 McCreary, 233 223
Irish *v.* M. & St. P. R. R. Co., 19 Minn. 376 342
Irwin *v.* N. Y. C. R. R. Co., 59 N. Y. S. C. 473, 653 175, 328
Isaacsen *v.* N. Y. C. & H. R. R. Co., 25 Hun, N. Y. 350 328
Italian Bark Vincenzo T., 10 Benedict (U. S. D. C.), 228 45
Izett *v.* Mountain, 4 East, 371 100

J.

Jackson *v.* Union Marine Ins. Co., 44 L. J. C. P. 27 269
Jacobs *v.* Tutt, 33 Fed. Rep. 412 40
Jacobus *v.* St. Paul, etc., R. R. Co., 20 Minn. 125 123
James *v.* Greenwood, 20 La. Ann. Rep. 297 295
Jefferson R. R. Co. *v.* Irvin, 46 Ind. 180 397, 496
Jenkins *v.* Picket, 9 Yerger (Tenn.), 480 171
Jenkyns *v.* Brown, 14 Q. B. 496 482, 485
Jenneson *v.* C. & A. R. R. Co., 5 Clark (D. C. of Phila.), 409; 4 Am. Law Reg. 234 328, 348

SECTION

Jennings *v.* Grand Trunk Ry. Co., 52 Hun (N. Y.), 227 101, 328
Jessel *v.* Bath, L. R. 2 Exch. 267; 36 L. J. Exch. 149; 15 W. R. 1041 61, 167, 428, 429, 430, 433
Jesson *v.* Solly, 4 Taunt. 52 355
Jobbitt *v.* Coundry, 29 Barb. (N. Y.) 509 368
Johnson *v.* Chapman, 35 L. J. C. P. 23; 19 C. B. N. S. 563 239, 250
Johnson *v.* Dodson, 2 M. & W. 653 472
v. Friar, 4 Yerg. (Tenn.) 48 266, 268, 269
v. New York Central R. R. Co., 33 N. Y. 610, reversing 31 Barb. N. Y. 196 197, 198, 335
Johnston *v.* Benson, 4 Moore, 90; S. C. 1 B. & B. 454 216, 268, 317
v. Crane, 1 Kerr (N. B.), 356 190, 249
Jones *v.* Hoyt, 23 Conn. 157 78, 380
v. Nicholson, 10 Exch. 28; S. C. 1 B. & B. 454 210
v. Pitcher, 3 Stew. & P. (Ala.) 135 105, 266, 267, 275
v. Sims, 6 Porter (Ala.), 138 472
v. Walker, 5 Yerger (Tenn.), 427 17
Joyce *v.* Swank, 17 C. B. (N. S.) 83 489
Judson *v.* Western R. R. Co., 6 Allen (88 Mass.), 486 37, 121

K.

Kaiser *v.* Hoey, 16 N. Y. St. Rep'r, 803 386
Kallman *v.* U. S. Ex. Co., 3 Kan. 205 116, 142
Kansas, etc., R. R. Co. *v.* Nichols, 9 Kan. 235 116, 217
Kansas, etc., R. R. Co. *v.* Reynolds, 8 Kan. 623; 17 Kan. 251 116, 217
Kay *v.* Wheeler, 2 L. R. C. P. 302 272, 298

SECTION

Keene *v.* Whistler, 2 Sawyer, 348 232
Keith *v.* Amende, 1 Bush, 455 45
v. Murdock, 2 Washington, 297 363
Keiwert *v.* Meyer, 62 Ind. 587 93
Kelham *v.* The Kensington, 24 La. Ann. Rep. 100 203
Kelley *v.* Bowker, 11 Gray, 428 32
Kemp *v.* Coughtry, 11 Johns. (N. Y.) 107 202, 294
v. Falk, L. R. 7 App. C. 573, 582; *Ex parte* Davis, L. R. 13 Ch. Div. 628 533, 544, 545, 546, 547
v. McDougall, 23 U. C. Q. B. 380 412
Kendall *v.* London, etc., R'y Co., L. R. 7 Ex. 373 221
Kendrick *v.* Delafield, 2 Caines (N. Y.) 67 209
Kennedy *v.* Dodge, 1 Benedict, 311 400, 402
Kenrig *v.* Eggleston, Aleyn, 93 247
Kent *v.* Midland R. Co., 10 Q. B. 1 341
Kern *v.* Deslandes, 10 C. B. N. S. 205 74
Ketchum *v.* American, etc., Express Co., 52 Mo. 390 261
Keyser *v.* Harbeck, 3 Duer, 391 534
Kiff *v.* Old Colony, etc., R. R. Co., 117 Mass 591 301
Kimball *v.* Brander, 6 La. 711 48
v. Rutland, etc., R. R. Co., 26 Vt. 247 102, 137, 217
Kimber *v.* Southern Exp. Co., 22 La. Ann. Rep. 158 34
Kimlock *v.* Craig, 3 T. R. 786 491, 533
King *v.* Shepherd, 3 Story, 349 193, 272, 296
v. Woodbridge, 34 Ver. 565 151
Kinney *v.* Central R. R. Co., 34 N. J. Law, 513; 32 Dutcher, 407 130
Kirby *v.* Adams Express Co., 2 Mo. App. 369 102, 125
Kirk *v.* Folsom, 23 La. Ann. Rep. 584 269
Kirk, etc., R. R. Co. *v.* Crisp, 14 C. B. 527 100
Kirkland *v.* Dinsmore, 62 N. Y. 171, reversing S. C. 8 Hun, 296; 4 T. & C. 304 150, 151

SECTION

Kirkman *v.* Bowman, 8 Robinson (La.), 246 14, 25, 26, 167, 170, 180
Kirkpatrick *v.* Amer. S. S. Co., 2 Weekly Notes (Pa.), 308 352
Kitchener *v.* Spear, 30 Vermont, 545 537
Klauser *v.* Express Co., 21 Wis. 21 192
Knapp *v.* U. S. & Canada Express Co., 55 N. H. 348 169
Knell *v.* U. S. & Brazil S. S. Co., 1 Jones & Spencer (33 N. Y. Sup. Ct.), 423 129, 159
Knight *v.* Cambridge, 1 Str. 581 (9 Geo. II.) 205
Knott *v.* Raleigh, etc., R. Co., 98 N. C. 73 343
Knowles *v.* Dabney, 105 Mass. 437 63
Knox *v.* Schr. Ninetta, Crabbe (U. S. Dis. C. Pa.), 534 67, 88
Krall *v.* Burnett, 25 W. R. 305 70, 380
Krender *v.* Woolcott, 1 Hilton (N. Y.), 223 325, 331
Krohn *v.* Nurse, 5 Buch. (Cape of Good Hope) 85 321
Krulder *v.* Ellison, 47 N. Y. 36 471
Kyle *v.* B. & L. H. R'y Co., 16 U. C. C. P. 76 396
v. Lawrence R. R. Co., 10 Rich. L. Rep. (S. C.) 382 331
K. C. St. J. & C. B. R. R. Co. *v.* Simpson, 30 Kan. 645 116

L.

Ladue *v.* Griffiths, 11 Smith, 25 N. Y. 364 342
Laing *v.* Colder, 8 Penna. St. 479 133
Lake *v.* Hurd, 38 Conn. 536 355
Lake Shore & Michigan Southern Ry. Co. *v.* Bennett, 89 Ind. 457 315
Lake Shore, etc., R. R. Co. *v.* Perkins, 25 Mich. 329 217
Lamb *v.* Camden, etc., R. R. Co., 2 Daly, 454; 46 N. Y. 271 102, 225, 348
v. Parkman, 1 Sprague, 343 87, 322

SECTION

Lamont *v.* Nashville, etc., R. R. Co., 9 Heisk. (Tenn.) 58 190, 193, 194
Lanata *v.* Ship Henry Grinnell, 13 La. Ann. Rep. 24 412
Landsberg *v.* Dinsmore, 4 Daly (N. Y. C. P.), 490 8
Lanfear *v.* Blossom, 1 La. Ann. Rep. 148 523
v. Sumner, 17 Mass. 110 505
Langworthy *v.* N. Y. & H. R. R. Co., 2 E. D. Smith (N. Y.), 195 8
La Pointe *v.* Grand Trunk R. R. Co., 26 U. C. Q. B. 479 100
Latham *v.* Stanbury, 3 Stark. 143 319
Laughlin *v.* C. & N. W. Rly. Co., 48 Wis. 204 347
v. Gonahl, 11 Robinson, 140 491
Laurence *v.* N. P. & B. R. R. Co., 36 Conn. 63 109, 150
Laurie *v.* Douglass, 15 M & W. 746 203, 269, 270
Laveroni *v.* Drury, 8 Exch. 166; S. C. 22 L. J. Exch. 2 272, 298
Lawrence *v.* Aberdeen, 5 B. & Ald. 107 222
v. McGregor, 1 Wr. Ch. (Ohio) 193 63, 71, 78, 192, 197, 201
v. Minturn, 17 How. 100 248, 249, 269, 271, 471
v. W. St. P. R. R. Co., 15 Minn. 390 328
Lawton *v.* Sun Mutual Ins. Co., 2 Cush. (56 Mass.) 500 206, 208
Layng *v.* Stewart, 1 Watts & Sergeant (Pa.), 222 369
Leaf *v.* Canada Shipping Company, 1 Legal News (Canada), 218 362
Leask *v.* Scott, 2 Q. B. 376 539
Lebeau *v.* Genl. Stm. Nav. Co., 8 L. R. C. P. 88; 42 L. J. C. P. 1 38, 62, 76
Ledue *v.* Ward, L. R. 20 Q. B. D. 475 65
Lee *v.* Kimball, 45 Me. 172 533, 539, 542
v. R. & G. R. R. Co., 72 N. C. 236 131
v. Salter, Hill & Denio, Supplt. (N. Y.) 163 14
Leeson *v.* Holt, 1 Stark. 148 100

SECTION

Lemaitre *v.* Merle, 2 Robin. La. 402 269
Lempriere *v.* Pasley, 2 Term. R. 483 533
Lengsfield *v.* Jones, 11 La. Ann. Rep. 624 102
Leniv *v.* Dudgeon, L. R. 3 C. P. 17, n. 240
Lenox *v.* Ins. Co., 3 Johns. Cas. 178 249, 250
Leo *v.* St. P. M. & M. Ry. Co., 30 Minn. 438 346
Le Sage *v.* Great Western R. R. Co., 1 Daly, 306 197
Lesinsky *v.* Great Western Dispatch, 10 Mo. App. Rep. 134 343
Letchford *v.* The "Golden Eagle," 17 La. Ann. Rep. 9 269
Levering *v.* Union Trans. Co., 42 Mo. 88 125
Levois *v.* Gale, 17 La. Ann. Rep. 302 35, 37, 54
Levy *v.* Pontchartrain R. R. Co, 23 La. Ann. 477 223
v. Southern Express Co., 4 S. Car. 234 134, 348
Lewis *v.* Great Western R'way Co., 26 W. R. 255; 5 Hurlstone & Norman, 867 260, 261, 388
v. Hancock, 11 Mass. 72 363
v. Ludwick, 6 Colder (Tenn.), 368 293, 294
v. McKee, L. R. 2 Exch. 37; S. C. L. R. 4 Exch. 58 365
v. Ship "Success," 18 La. Ann. Rep. 1 269, 283
Libby *v.* Gage, 14 Allen (Mass.), 261 375
v. Ingalls, 124 Mass. 503 414
Lickbarrow *v.* Mason, 5 T. R. 683; 2 T. R. 63; 1 H. Bl. 357; 6 East, 21 440, 442, 460, 462, 533, 544
Limberger *v.* Westcott, 49 Barb. (N. Y.) 283 129, 157
Lishman *v.* Christie, L. R. 19 Q. B. D. 333 17, 73
Little *v.* Boston, etc., R. Co., 66 Me. 239; 16 Am. L. Reg. (U. S.) 442 37, 119
v. Fargo, 50 N. Y. Supr. Ct. 233 316
v. Semple, 8 Mo. 99 351
Little M. R. R. Co. *v.* Washburn, 22 Ohio St. 324 334

SECTION

Little Rock, etc., R. R. Co. *v.* Corcoran, 40 Ark. 375 228
Little Rock, etc., Ry. *v.* Daniels, 49 Ark. 352 106
Little Rock, etc., Ry. Co. *v.* Talbot, 47 Ark. 97; 39 Ark. 523 226, 228
Liverpool Steam Co. *v.* Phenix Ins. Co., 129 U. S. 397 103
Liverpool & Great Western Steam Company *v.* Phœnix Ins. Co., 129 U. S. 397 96
Livingston *v.* N. Y. C. & H. R. R. Co., 5 Hun (N. Y.), 562 346
Lloyd *v.* General Iron Screw Collier Co., 10 L. T. N. S. 586; S. C. 12 W. R. 882; 10 Jur. N. S. 661; 33 L. J. Exch. 269; 3 H. & C. 284 212, 273
Lock Co. *v.* R. R. Co., 48 N. H. 339 325, 329
Lockyer *v.* Affley, 1 T. R. 252 205, 206
Loeb *v.* Peters, 63 Ala. 243 537, 542
Logan *v.* Mobile Trade Co., 46 Ala. 514 329
Long *v.* N. Y. C. R. R. Co., 50 N. Y. 76 65, 150
Lord *v.* G. N. & P. S. Co., 4 Sawyer, 292 103
Louisana Bank *v.* Laveille, 52 Mo. 380 167, 432
L. & N. R. R. Co. *v.* Campbell, 7 Heiskell (Tenn.), 253 329
L. & N. R. R. Co. *v.* Oden, 80 Ala. 38 105, 223, 238
L. & N. R. R. Co. *v.* Sherrod, 84 Ala. 178 105, 144
Louisville, etc., R. R. Co. *v.* Gilbert, 12 S. W. Rep. 1018 170, 223
Louisville, etc., R. R. Co. *v.* Hedger, 9 Bush (Ky.), 645 117, 127
Louisville, etc., R. R. Co. *v.* Meyer, 78 Ala. 597 340
Louisville, etc., R. Co. *v.* Wilson, 119 Ind. 352 65
Lovering *v.* Buck Md. Coal Co., 54 Pa. St. 291 190
Lowe *v.* Booth, 13 Price, 329 100
Lowell Wire Fence Co. *v.* Sargent, 8 Allen (Mass.), 189 334
Lowenberg *v.* Jones, 53 Miss. 688 328, 343
Lowry *v.* Russell, 8 Pick. (25 Mass.) 360 77, 83

SECTION

Lucas *v.* Nockells, 4 Bingham, 731 359
Lupe *v.* A. & P. R. R. Co., 2 Mo. App. 77 125
Lutscher *v.* Comtoir d'Escompte de Paris, L. R. 12 B. D. 709 422
Lyons *v.* Hill, 5 Am. Law Reg. (N. S.) 692 382
L. K. M. R. & L. R. Co. *v.* Talbot, 47 Ark. 97 106, 223, 226, 228
L. L. G. R. R. Co. *v.* Maris, 16 Kansas, 333 412
L. R. & F. & S. R. R. Co. *v.* Hall, 32 Arkansas, 669 26

M.

Macauley *v.* Furness R. R. Co., 21 W. R. 140; 27 L. T. N. S. 485 100
Mackinnon *v.* Taylor, Com. Ca. 514 243, 321
Madan *v.* Sherrard, 73 N. Y. 329; 42 N. Y. Supr. Ct. Rep. 353 151
Madhub Chunden Dey *v.* Law, 13 Ben. L. R. 394 259
Madison, etc., R. Co. *v.* Whitsel, 11 Ind. 55 476
Maghee *v.* C. & A. R. R. Co., 45 N. Y. 514 150, 197, 348
Magnin *v.* Dinsmore, 6 J. & Sp. (N. Y.) 248 41
v. Dinsmore, 56 N. Y. 168 144
v. Dinsmore, 62 N. Y. 35 39, 146
v. Dinsmore, 70 N. Y. 410 146
Magruder *v.* Gage, 33 Md. 344 472
Maguire *v.* Dinsmore, 62 N. Y. 35; 56 N. Y. 168 129
Mahomed Ismailjee *v.* B. I. S. N. Co., 9 Cal. W. Rep. C. R. 396 394
Mahon *v.* The Olive Branch, 18 La. Ann. Rep., 107 273
Major *v.* White, 7 Car. & P. 41 243
Mallory *v.* Barrett, 1 Ex. Smith, 234 (C. P. of N. Y.) 328
v. Tioga R. R. Co., 39 Barb. 488 7
Malone *v.* B. & W. R. R. Co., 12 Gray, 388 121

SECTION

Malpica *v.* McKown, 1 La. Rep. 249 98
Manchester *v.* Milne, 1 Abbott Bros. 115 26
Manhattan Oil Co. *v.* C. & A. R. R. Co., 5 Abb. Pr. N. P. (N. Y.) 289; 54 N. Y. 197; S. C. 52 Barb. (N. Y.) 72 223, 348, 349
Mann *v.* Birchard, 7 Am. Law Reg. (N. S.) 702; 40 Vt. 326 137, 325, 331
Marcardier *v.* Chesapeake Ins. Co., 8 Cranch, 39 210
Marialegue *v.* Louisiana Ins. Co., 8 La. Rep. 65 206
Marine Bank *v.* Fiske, 71 N. Y. 353 510
v. Wright, 46 Barb. 45; 48 N. Y. 1 496, 510, 519, 521
Mark *v.* Surrey, 29 Fed. Rep. 608 252
Marsh *v.* Blythe, 1 McCord, 360; 1 N. & McC. 170 212, 266, 269, 275
Martin *v.* Am. Ex. Co., 19 Wis. 336 145, 350
v. Cole, 104 U. S. 30 70
v. Great Indian, etc., Ry. Co., 3 L. R. Ex. 9 261
v. Salem Marine Ins. Co., 2 Mass. 420 299
Maryland Ins. Co. *v.* Levy, 7 Cranch, 26 197
Maryland Ins. Co. *v.* Ruden, 6 Cranch, 338 419
Maslin *v.* B. & O. R. R. Co., 14 W. Va. Reps. 180 139
Mason *v.* Grand Trunk Ry. Co., 37 U. C. Q. B. 163 386
v. Great Western Ry. Co., 31 Up. Can. Q. B. 73 480, 485
Mather *v.* American Ex. Co., 9 Bissell, 293 113
v. American Exp. Co., 2 Fed. Rep. 49 37, 93, 101
Matthews *v.* Poythress, 4 Ga. 287 453
May *v.* Babcock, 4 Ohio, 334 64, 65, 78
Mayer *v.* Gr. Tr. Ry. Co., 31 U. C. C. P. 248 157, 414
Mayhew *v.* Eames, 3 B. & C. 601 159
McArthur *v.* Sears, 21 Wend. (N. Y.) 190 188, 192, 193, 201, 223, 266, 267

SECTION

McCall *v.* Brock, 5 Strob. (S. C.) 119 192, 223, 224
McCance *v.* L. & N. R. R. Co., 3 H. & C. 343; 34 L. J. Exch. 39; 10 Jur. N. S. 1058; 12 W. R. 1086; 11 L. T. N. S. 426 34
McCann *v.* B. & O. R. R. Co., 20 Md. 202 159, 339
McCarthy *v.* T. H. & I. R. R. Co., 9 Mo. App. 159 328
McCauley *v.* Davidson, 13 Minn. 162 471
McClary *v.* Sioux City, etc., R. R. Co., 3 Neb. 44 196
McClenaghan *v.* Brock, 5 Rich. Repts. (S. C.) 17 191, 192
McClure *v.* Cox, 32 Ala. 617 105
v. Hammond, 1 Bay, 99 275
McConnell *v.* Norfolk, etc., R. Co., 9 Southeast Rep. (Va.) 1006 328
McCoy *v.* Erie, etc., R. R. Co., 42 Md. 498 22, 120, 155
v. Keokuk, etc., R. R. Co., 44 Ia. 424 115, 217
McCranie *v.* Wood, 24 La. Ann. Rep. 406 293
McCready *v.* Holmes, VI. Am. L. R. 229; Dist. Ct. U. S. for S. Carolina 30
McCrosson *v.* Gr. Tr. Ry. Co., 23 U. C. C. P. 107 410
McCune *v.* B. C. R. & N. R. Co., 52 Iowa, 600 20, 21, 115
McDaniel *v.* Chicago, etc., R. Co., 24 Iowa, 412 92, 115
McEwen *v.* J. M. & I. R. R. Co., 33 Ind. 369 368, 397
McFadden *v.* Mo. Pac. Ry. Co., 92 Mo. 343 69, 101, 125, 226
McGregor *v.* Kilgore, 6 O. 358 266, 352
McGrevy *v.* Rathbone, 11 U. C. (C. P.) 186 364
McHenry *v.* P. W. & B. R. R. Co., 4 Harr. (Del.) 448 192, 194
McIntosh *v.* Gastenhofer, 2 Robinson (La.), 403 47
McIntyre *v.* Bowne, 1 Johns. (N. Y.) 229 210
McKay *v.* N. Y. Cent., etc., R. R. Co., 50 Hun (N. Y.), 563 336
McKinlay *v.* Morrish, 21 How. 343 322

SECTION

McLean *v.* Fleming, 25 L. T. N. S. 317; 2 L. R. H. L. (S. C. App.) 128 25, 30, 57, 359, 428, 429
McManus *v.* Lancashire, etc., Ry. Co., 4 H. & N. 328; 2 ib. 693 217
McMaster *v.* Walker, 8 L. C. Rep. 171 400, 407
McMillan *v.* Michigan R. R. Co., 16 Mich. 79 122, 150, 151, 155, 328, 337, 343
McNeil *v.* Tenth Natl. Bk., 46 N. Y. 325 434
McTyer *v.* Steele, 26 Ala. 487 64, 176
Mears *v.* Waples, 4 Houston, Del. 62 514, 515
Medley *v.* Hughes, 11 La. Ann. Rep. 211 400
Meech *v.* Smith, 7 Wendell, N. Y. 315 175, 183
Mellor *v.* Chapple, Lowndes on General Average, p. 42 239
Memphis, etc., R. R. Co. *v.* Reeves, 10 Wall. 176 190, 193, 194
Mendelsohn *v.* The Louisiana, 3 Woods Rep. 46 241, 322
Menzell *v.* R. R. Co., 1 Dillon's C. C. 531 223
Mercantile Ins. Co. *v.* Chase, 1 E. D. Smith, N. Y. 115 223, 333
Merchant's, etc., Bank *v.* Hewitt, 3 Iowa, 93 1
Merchant's Bank *v.* Union R. R. Co., 69 N. Y. 373 496, 502
Merchant's Disp. *v.* Merriam, 111 Ind. 5 414
Merchant's Dispatch and Trans. Co. *v.* Cornforth, 3 Col. 280 108, 234, 261
Merchant's Disp. Co. *v.* Smith, 76 Ill. 542 188, 192, 201, 471
Merchant's Disp. Trans. Co. *v.* Bolles, 80 Ill. 473 35, 348, 350
Merchant's Dispatch Trans. Co. *v.* Leyser, 89 Ill. 43 113, 150, 153, 223
Merchant's Disp. Trans. Co. *v.* Moore, 88 Ill. 136 158, 329, 339
Meredith *v.* Meigh, 2 El. & Bl. 363 420
Merian *v.* Funck, 4 Denio (N. Y.), 110 364, 365
Merrick *v.* Webster, 3 Mich. 268 197
Merrill *v.* Arey, 3 Ware (U. S. D. C.) 215 223, 267, 272

SECTION

Merrill *v.* Am. Exp. Co., 62 N. H. 514 386
v. Grunnell, 30 N. Y. 594 9
Merritt *v.* Earle, 29 N. Y. 115; 31 Barb. (N. Y.) 38 188, 192, 193
Mershon *v.* Hobensack, 2 Zabr. N. J. 380 192
Messonier *v.* Union Ins. Co., 1 N. & McC. (S. C.) 155 207
Meyer *v.* Dresser, 16 C. B. N. S. 646, 657; 33 L. J. C. P. 289; 12 W. R. 983; 10 L. T. N. S. 612; 10 Can. L. J. (O. S.) 308 15, 84, 95, 180, 375, 383
v. Lemcke, 31 Ind. 258 383
v. Peck, 1 Tiffany (28 N. Y.) 590; 33 Barb. 532 14, 25, 31
Meyerstein *v.* Barber, L. R. 4 H. L. 317 425, 427, 455, 456, 458, 466
Michaels *v.* New York Central R. R. Co., 30 N. Y. 564 196
Michigan Central R. R. Co. *v.* Burrows, 33 Mich. 6 235, 237, 286
Michigan Central R. R. Co. *v.* Curtis, 80 Ill. 324 196, 236
Michigan, etc., R. R. Co. *v.* McDonough, 21 Mich. 165 217
Michigan Central Ry. Co. *v.* Phillips, 60 Ill. 190 496
Michigan Southern, etc., R. R. Co. *v.* Heaton, 37 Ind. 448 223
Miller *v.* H., etc., St. J. R. Co., 24 Hun (N. Y.), 607 57, 75
v. Savings Association, 3 Weekly Notes, 480 530
v. Steam Nav. Co., 13 Barb. (N. Y.) 361 202
v. Steam Nav. Co., 10 N. Y. 431 192, 223, 224
v. Tetherington, 6 H. & N. 278; S. C. 30 L. J. Ex. 217; affirmed 7 H. & N. 954 239, 250
Miner *v.* N. & W. R. R. Co., 32 Conn. 91 356
Mirabita *v.* Imperial Ottoman Bank, 3 Ex. Div. 164; 38 Law Times, R. N. S. 597 529
Miss. C. R. R. Co. *v.* Kennedy, 41 Miss. 671 10
Missouri Pac. Ry. *v.* Beeson, 30 Kans. 298 68, 151

SECTION

Mitchell *v.* Ede, 11 Ad. & El. 888 479, 491, 516
v. U. S. Ex. Co., 46 Iowa, 214 47, 49
Moakes *v.* Nicholson, 19 C. B. N. S. 290 487
Mobile and Ohio R. R. Co. *v.* Franks, 41 Miss. 494 124
Mobile and Ohio R. R. Co. *v.* Weiner, 49 Miss. 725 124, 155
Monell *v.* N. C. R. R. Co., 67 Barb. (N. Y.) 531 324
Montgomery, etc., R. R. Co. *v.* Edmonds, 41 Ala. 667 223, 226
Montgomery, etc., R. R. Co. *v.* Moore, 51 Ala. 394 345
Montgomery *v.* Ship Abbey Pratt, 6 La. Ann. Rep. 410 49
Moore *v.* Am. Trans. Co., 24 Howard, 1 36
v. Evans, 14 Barb. (N. Y.) 524 102 261, 325
v. Harris, (1 L. R. P. C. App. Cas. 318); 45 L. J. P. C. 55; 34 L. T., N. S. 519; 24 W. R. 887 95, 394
v. Harris, 2 Quebec L. Rep. 147 45
v. Metropolitan Bank, 55 N. Y. 41 434
v. Mich. Cen. R. R. Co., 3 Mich. 23 223
v. Robinson, 62 Ala. 537 461, 467
v. Transportation Co., 24 How. 1 268
Moosum *v.* Brit. India Steam Nav. Co., 8 Cal. W. R. C. R. 35. 203
Morgan *v.* Dibble, 29 Tex. 108 194, 400
Moriarity *v.* Harnden's Exp., 1 Daily (N. Y.), 227 159
Morrison *v.* Davis & Co., 8 Harris (20 Pa. St.), 171 70, 185, 190, 196
v. McFadden, Penna. L. T. 5 Clark, 23 202
v. P. & C. Construction Co., 44 Wis. 405 140, 151, 221, 263
Morewood *v.* Pollock, 1 E. & B. 743; 22 L. J. Q. B. 250 232
Morse *v.* Brainerd, 8 Am. Law Reg. (U. S.) 604; 41 Vt. 550 323, 327, 328

SECTION

Morse *v.* Pesant, 2 Keyes (N. Y.), 16 413
v. Stm. T. Raymond, 220 (24 Car. H.); 1 Vent, 190; 1 Kent's Com. p. 302; Abbot on Shipping, p. iv. c. vi. sec. 2, p. 288 (10th ed.); 1 Kay on Shipping, p. 411 269, 294
Morville *v.* Great Northern Ry. Co., 16 Jur. 528; 21 L. J. Q. B. 319 100
Moseley *v.* Lord, 2 Conn. 389 176
Mosher *v.* South. Exp. Co., 38 Ga. 37 112, 329, 337
Moses *v.* B. & M. R. R. Co., 32 N. H. 523; 24 N. H. 71 127
v. Norris, 4 N. H. 304 191, 201
Moss *v.* Byrom, 6 T. R. 379 206
Muddle *v.* Stride, 9 Car. & P. 380 194
Mullarkey *v.* P. W. & B. R. R. Co., 9 Phila. (D. C. of Phila.) 114 328
Mulligan *v.* Illinois Cent. R. R. Co., 36 Iowa, 181 115, 150, 329, 339
Munn *v.* Baker, 2 Stark. 226 100
Murphy *v.* Creighton, 45 Iowa, 179 381
Murray *v.* Currie, L. R. 6 C. P. 24 243
v. Head, 3 Legal News (Canada), 47 379
v. Lardner, 2 Wall. 110 453
Murton *v.* Kingston and Montreal Forwarding Co., 18 Can. Law Jour. 278 31
Muschamp *v.* Lancaster R., 8 M. & W. 421 325, 329
Muser *v.* Am. Exp. Co. 1 Fed. Rep. (U. S. C. C.) 382 37, 144
v. Holland, 17 Blatch. 412 103, 223
Mynard *v.* Syracuse, etc., R. R. Co., 71 N. Y. 180; 7 Hun (N. Y.), 399 93, 101, 129, 217
M. C. R. R. Co. *v.* Boyd, 91 Ill. 268 91
M. C. R. R. Co. *v.* Burrows, 1 Law & Eq. Rep. 86; 33 Mich. 6 328, 344
M. C. R. R. Co. *v.* Hale, 6 Mich. 243, 257 122, 155, 412

SECTION

M. C. R. R. Co. *v.* Stockard, 11 Heiskell (Tenn.), 568 329
M. C. R. R. Co. *v.* Ward, 2 Mich. 538 7, 122
Mo. Coal & Oil Co. *v.* H. St. J. R. R. Co., 35 Mo. App. 84. 323, 328, 329
M. D. T. Co. *v.* Joesting, 89 Ill. 152 113, 153, 159, 161, 165
M. D. T. Co. *v.* Kahn, 76 Ill. 529 9, 202
M. D. T. Co. *v.* Theilbar, 86 Ill. 71 113, 153
M. & G. R. R. Co. *v.* Copeland, 63 Ala. 219 329
M. & G. R. R. Co. *v.* Prewitt, 46 Ala. 63 7
M. K. R. Co. *v.* Boyd, 91 Ill. 268 91
M. & O. R. R. Co. *v.* Jarboe, 41 Ala. 644 105, 261
Mo. Pac. Ry. Co. *v.* Fagan, 9 S. W. Rep. 749 70
Mo. Pac. Ry. Co. *v.* Young, 25 Neb. 651 325
M. & St. P. R. R. Co. *v.* Smith, 74 Ill. 197 91, 329
Mo. Valley R. R. Co. *v.* Caldwell, 8 Kansas, 244 116, 252
M. & W. P. R. R. Co. *v.* Moore, 51 Ala. 394 49, 344, 346
Myrick *v.* M. C. R. R. Co., 9 Bissel's Rep. 44 70
Mytton *v.* Midland R. Co., 4 H. & N. 615 325

N.

N. & C. R. R. Co. *v.* Estis, 7 Heisk. (Tenn.) 622 293, 294
Nangatuck R. R. Co. *v.* Beardsley Scythe Co., 33 Conn. 218 27
Nangatuck R. R. Co. *v.* Waterbury Button Co., 24 Conn. 483 328
Nashua Lock Co. *v.* W. & N. R. Co., 48 N. H. 339; 10 Am. Law Reg. (N. S.) 244 329
Nashville, etc., R. R. Co. *v.* David, 6 Heisk. (Tenn.) 261 189, 190, 200
Nashville, etc., R. R. Co. *v.* Jackson, 6 Heisk. (Tenn.) 271 135, 261, 263
Nathans *v.* Giles, 5 Taunt, 558 496

SECTION

National Bk. of Commerce *v.* Merchants' Nat. Bk., 1 Otto, 92 523, 525, 526
Navigation Co. *v.* Dwyer, 29 Texas, 376 203
Naylor *v.* Battzell, Taney's C. C. Dec. 55 98
Neal *v.* Sanderson, 2 Sm. & M. (Miss.) 572 188, 201
Nebenzahl *v.* Fargo, 22 N. Y. St. Repr. 231 414
Neekey *v.* St. Louis, etc., R. Co., 35 Mo. App. 79 414
Nelson *v.* H. R. R. R. Co., 48 N. Y. 498 101, 159
v. National Steamship Co., 7 Ben. 340 103, 253
v. Stephenson, 5 Duer (N. Y.), 538 48, 49, 56
v. Woodruff, 1 Black. 156 44, 47, 49, 282
Nemours *v.* Vance, 19 How. 162 248, 269
Nesbitt *v.* Lushington, 4 T. R. 783 291, 310
Nevins *v.* Bay State Stm. Co., 4 Bosw. 225 129
Newberger *v.* Howard & Co.'s Ex., 6 Philada. (Penn). 174 145, 150
New Brunswick S. N. Co. *v.* Tiers, 24 N. J. (Law) 697 192
New Brunswick S. & C. Trans. Co. *v.* Tiers, 4 Zabr. (N. J.) 697 193
Newcomb *v.* Boston & Lowell R. R. Co., 115 Mass. 233 528
Newell *v.* Smith, 49 Vt. 255 324, 325
Newhall *v.* C. P. R. R., 51 Cal. 345 533, 548
N. J. R. R. & Trans. Co. *v.* P. R. R. Co., 3 Dutcher (N. Y.), 100 7, 20, 130
N. J. S. N. Co. *v.* Merchants' Bank, 6 How. 344 100, 103, 162, 163, 223
Newman *v.* Smoker, 25 La. Ann. Rep. 303 118, 150, 160
New Orleans, etc., R. R. Co. *v.* Faler, 58 Miss. 911 223, 226
New Orleans Mutual Ins. Co. *v.* New Orleans, etc., R. R. Co., 20 La. Ann. Rep. 302 118, 223
Newson *v.* Thornton, 6 East, 40 442
New York Central *v.* Eby, 12 Atl. Rep. 482 252

SECTION

New York Central *v.* H. R. R. R. Co., 20 Hun (N. Y.), 39 230
Nichol & Co. *v.* Castle, 9 Beav. H. C. Rep. 321 57, 61
Nicholas *v.* New York Central, etc., R. R. Co., 89 N. Y. 370; 4 Hun, 327 77, 129, 190, 217, 234, 240
Nichols *v.* De Wolf, 1 R. J. 1. 277 177
Nicholson *v.* Willan, 5 East, 507 100
Nimter *v.* Pacific R. R. Co., 41 Mo. 503 173
Nitro-Phosphate, etc., Co. *v.* Dock Co., 9 L. R. Ch. Div. 503 189, 190
Norman *v.* Phillips, 14 M. & W. 277 472
Norris *v.* Savannah R. Co., 1 South. Rep. 475 190
No. Pa. R. Co. *v.* Bank, 123 U. S. 727 414
Northern Trans. Co. *v.* McClary, 66 Ill. 233 17
Northrop *v.* S. B. & N. Y. R. R. Co., 3 Abb. Dec. 386 343
Notara *v.* Henderson, L. R. 5 Q. B. 346; S. C. 41 L. J. Q. B. 158 214, 286
Nottebohn *v.* Richter, L. R. 18 Q. B. D. 63 318
Noyes *v.* R. & B. R. R. Co., 27 Vt. 110 323
Nudd *v.* Wells, 11 Wisc. 407 412
Nugent *v.* Smith, 1 L. R. C. P. Div. 19, 423 189, 191, 222
Nutt *v.* Bourdieu, 1 T. R. 323 209, 210
Nutting *v.* C. R. R. Co., 1 Gray (67 Mass.), 502 328, 331

O.

Oakley *v.* Portsmouth, etc., Co., 25 L. J. Ex. 99 190
v. Portsmouth, etc., Packet Co., 11 Exch. 617 192
O'Brien *v.* Gilchrist, 34 Me. 554 14, 32, 46, 48
O'Bryan *v.* Kinney, 74 Mo. 125 65, 151
Ochs *v.* Price, 6 Heiskell, 483 472
Ogden *v.* Barker, 18 Johnson (N. Y.), 87 297

SECTION

Ogdensburg, etc., R. R. Co. *v.* Pratt, 22 Wall. 133 220
Ogg *v.* Shuter, L. R. 1 C. P. Div. 159 483, 528
Ohio, etc., R. R. Co. *v.* Dunbar, 20 Ill. 623 217, 220
Ohio & M. R. Co. *v.* Emrich, 24 Ill. App. 245 329
Ohio, etc., R. Co. *v.* Selby, 47 Ind. 471 114
Ohio, etc., R. R. Co. *v.* Tohe, 51 Ind. 181 300, 301
Ohrloff *v.* Briscall, L. R. 1 P. C. 231; S. C. 35 L. J. P. C. 63 242, 243, 251
Oliver *v.* Great Western Railway Co., 28 U. Can. C. P. 143 167, 429
v. Moore, 12 Heiskell (Tenn.), 481, 482 479, 491
v. Muggeride, 5 Can. Law Jour. (O. S.) 166 357
Olwell *v.* Adams Ex. Co., 1 Cent. L. J. 186 135
Ontario Bank *v.* Hanlon, 23 Hun (N. Y.), 283 63
Oppenheimer & Co. *v.* U. S. Exp. Co., 69 Ill. 62 37, 39, 143
Orange Co. Bank *v.* Brown, 9 Wendell (N. Y.), 85 38
Ormsby *v.* U. P. R. R. Co., 2 McCrary, 48; 4 Fed. Rep. (U. S. C. C.) 170, 706 103, 157, 390
Orndoff *v.* Adams Exp. Co., 3 Bush (Ky.), 194 38
O'Rourke *v.* Ry. Co., 23 U. C. Q. B. 427 151
v. The C., B. & Q. R. Co., 44 Iowa, 526 344
v. Tons of Coal, 1 Fed. Rep. 623 65
Ortt *v.* Minneapolis, etc., R. Co., 36 Minn. 396 328, 339
Overdoff *v.* Adams Ex. Co., 3 Bush, 194 117
Owen *v.* Johnson, 2 Ohio St. 142 382
Oxley *v.* St. Louis, etc., R. R. Co., 65 Mo. 629 125, 218, 238, 395

P.

Packard *v.* Taylor, 35 Ark. 402 192, 343
Palmer *v.* Grand Junction Ry. Co., 4 M. & W. 749 217

SECTION

Palmer *v.* Holland, 51 N. Y. 416 325
v. Lorillard, 16 Johnson (N. Y.), 348 269, 297
v. Naylor, 23 L. J. Ex. 323 291
Pardee *v.* Drew, 25 Wend. (N. Y.) 459 39
Pardington *v.* South Wales R'way Co., 38 Eng. L. & Eq. Rep. 432 217
Park *v.* Porter, 2 Robinson, 342 491
Parker *v.* Flagg, 26 Maine, 181 223
v. Patrick, 5 T. R. 175 533
Parmelee *v.* Lowitz, 74 Ill. 116 10, 35
v. West. Trans. Co., 26 Wis. 439 329
Parrison *v.* Memphis Ins. Co., 19 How. 312 271
Parsons *v.* Hardy, 14 Wend. (N. Y.) 215 190
v. Monteath, 13 Barb. (N. Y.) 353 192, 223, 224
Patapsco Co. Ins. Co. *v.* Coulter, 3 Pet. 222 205
Paterson *v.* Dakin, 31 Fed. Rep. 682 73
Paton *v.* Bliss, 1 Bissell, 15 192
Patten *v.* Thompson, 5 M. & S. 350 491
Patterson *v.* Clyde, 67 Pa. St. 500 79, 102, 162, 165, 227
Pattison *v.* Mills, 1 Dow. & C. 342; 2 Blight (N. S.), 519 225
Patton *v.* McGrath, Dudley (S. C.), 159 134, 191, 192, 223
Peck *v.* Ritcher, 66 Mo. 114 480
v. Weeks, 34 Conn. 145 109, 194
Pecks *v.* Dinsmore, 4 Porter (Ala.), 212 14, 64, 159
Peebles *v.* B. & A. R. R. Co., 112 Mass. 98 32
Peet *v.* C. & N. W. Ry. Co., 20 Wis. 594; 19 Wis. 118 325, 332
Peixotti *v.* McLaughlin, 1 Strob. 468 2
Pemberton *v.* N. Y. Central R. R. Co., 104 Mass. 144 121, 223
Pendall *v.* Rench, 4 McLeans, 259 169, 171
Pender *v.* Robbins, 6 Jones, 207 36
Pendergast *v.* Adams Ex. Co., 101 Mass. 120 328, 340
Penn *v.* Buffalo, etc., R. R. Co., 49 N. Y. 204; 3 Laws (N. Y.), 443 217, 257

SECTION

Penna. R. R. Co. *v.* Butler, 57 Pa. St. 335 133
Penna. Co. *v.* Fairchild, 69 Ill. 260 91, 329
Penna. R. R. Co. *v.* Fries, 87 Pa. St. 234, 378 133, 191, 223, 224
Penna. R. R. Co. *v.* Henderson, 51 Pa. St. 315 133
Penna. Co. *v.* Holderman, 69 Ind. 18 411
Penna. R. R. Co. *v.* McCloskey, 23 Pa. St. 526 133
Penna. R. R. Co. *v.* Rapordon, 119 Pa. St. 577 133
Pennewill *v.* Cullen, 5 Harr. (Del.) 238 188, 191
People's Nat. Bk. *v.* Stewart, 3 Pugs. & Bur. (New Brunswick), 268 482, 485, 530
Perkins *v.* Hill, 1 Sprague, 123 378
v. Hill, 2 Woodbury & Minoto, W. S. C. C., 158 73
v. P. S. & R. R. Co., 47 Me. 573 323, 328
Perret *v.* Sauvinet, 2 La. Ann. Rep. 559 364
Perry *v.* Thompson, 98 Mass. 249 121, 151, 152
Peters *v.* Warren Ins. Co., 14 Pet. 99 212, 269
Petitt *v.* First Nat. Bk. Memphis, 4 Bush (Ky.), 334 496, 510
Petrie *v.* Heller, 35 Fed. Rep. 310 64
Phifer *v.* C. C. R. R., 89 N. C. 311 131
Phila. & R. R. R. Co. *v.* Barnard, 3 Ben. 39 364
Phila. & R. R. R. Co. *v.* Beck, 125 Pa. 620 335
P. R. R. Co. *v.* Berry, 18 P. F. Sm. (Pa.) 272 323, 327
Philadelphia, etc., R. Co. *v.* Harper, 29 Md. 330 293, 295
P. & R. R. R. Co. *v.* Ramsey, 8 Norris (Pa.), 474 327, 332
P. C. & St. L. R. R. Co. *v.* Barrett, 36 Ohio State, 448 81, 132, 156
P. C. & St. L. R. Co. *v.* Morton, 61 Ind. 539 328
Philleo v. Sanford, 17 Texas, 227 10
Phillips *v.* Bingham, 26 Ga. 617 197

SECTION

Phillips *v.* Clark, 5 Jur. (N. S.) 1081; 2 C. B. N. S. 156; S. C., 3 Jur. N. S. 467; 26 L. J. C. P. 166 100, 252
v. Earle, 8 Pickering (25 Mass.), 182 35, 37
v. N. C. R. R. Co., 78 N. C. 294 328
Phœnix Ins. Co. *v.* E. & W. T. Co., 10 Biss. 18 269
Phyn *v.* Royal Exch. Ins. Co., 7 T. R. 505 205, 207
Pickering *v.* Buck, 15 East, 44 470
v. Barkley, Styles, 132; S. C. 2 Rall, Abr. 248 266, 269, 271, 292
Pickernel *v.* Janberry, 3 F. & F. C. P. Eng. 217 179
Piero *v.* Windsor, 2 Clifford, 18 246
Pietro G., 38 Fed. Rep. 148 356
Pilgreen *v.* State, 71 Ala. 368 382
Pindell *v.* St. Louis, etc., R. Co., 34 Mo. App. 675 398
Pipon *v.* Cope, 1 Camp. 434 206, 211
Pitre *v.* Offut, 21 La. Ann. Rep. 679 79
Pittsburgh, etc., R. R. Co. *v.* Hallowell, 65 Ind. 188 294, 315
Pittsburgh, etc., R. R. Co. *v.* Hazen, 84 Ill. 36 190, 196, 235, 314
Place *v.* Union Express Co., 2 Hilt. 19 391
Plaisted *v.* Boston, etc., S. Nav. Co., 27 Me. 132 212, 223, 269
Pollard *v.* Vinton, 105 U. S. 7 167, 428, 432, 433
Pope *v.* Nickerson, 3 Story Rep. 465 97
Porcher *v.* Northeastern R. R. Co., 14 Rich. (S. C.) 181 293, 296
Porter *v.* C. & N. W. R. R. Co., 20 Iowa, 73 47
v. Robinson, 2 Juta's Rep. (Cape Good Hope, E. D.) 16 45
v. Southern Ex. Co., 4 S. C. 135 134, 392
Porteus *v.* Watney, L. R. 3 Q. B. D. 534 74
Porterfield *v.* Brooks, 8 Hump. (Tenn.) 497 221
v. Humphreys, 8 Hump. (Tenn.) 497 9

SECTION

Potter *v.* Sharp, 24 Hun (N. Y.), 179 129, 256
Poucher *v.* N. Y. C. R. Co., 49 N. Y. 263 129
Powell *v.* Mills, 1 George (Miss.), 231 10
v. Mills, 8 George (Miss.), 691 10
v. Mills, 37 Miss. 691 221
v. Pennsylvania R. R. Co., 32 Pa. St. 414 133, 217, 220
Powers *v.* Davenport, 7 Blackf. (Ind.) 497 197
Pratt *v.* O. & L. C. R. R. Co., 102 Mass. 557 152, 220
v. Parkman, 24 Pick. 42 479, 516
Prentice *v.* Decker, 49 Barb. 21 129
Price *v.* Hartshorne, 44 N. Y. 94 100, 129, 184, 190
v. Powell, 3 N. Y. 322 49
Proprietors Trent Nav. Co. *v.* Wood, 3 Esp. 127 192
Providence, etc., Steamship Co. *v.* Hill Mfg. Co., 109 U. S. 578 233
Pruitt *v.* H. & St. Jo. R. R. Co., 62 Mo. 527 170, 172, 190
Purcell *v.* S. Ex. Co., 34 Georgia, 315 67, 112
Putnam *v.* Furnam, 71 New York, 590 412, 413
Putnam *v.* Tillotson, 18 Metc. (54 Mass.) 517 166, 169

Q.

Quimby *v.* Vanderbilt, 17 N. Y. 306 327
Quintard *v.* Bacon, 99 Mass. 185 420

R.

R. R. Co. *v.* Androscoggin Mills, 22 Wall. 594 325, 327, 345
v. Fries, 192
v. Lockwood, 17 Wall. 357 102, 103, 132, 133
v. Mf. Co., 16 Wall. 318, 324 103, 157, 323, 328
v. Northam, 2 Ben. 1 356, 400

SECTION

R. R. Co. *v.* Pratt, 22 Wall. 123 103, 323, 325, 327, 328, 345
Railroad Co. *v.* Reeves, 10 Wallace (U. S. S. C.), 176 174, 196
Raisted *v.* Boston, etc., S. Nav. Co., 27 Me. 132 192
Randall *v.* Dabney, 105 Mass. 437 63
v. Smith, 63 Me. 105 84
Ranger *v.* G. W. R. R. Co., 1 Railway & Canal Cas. 1 100
Rawles *v.* Deshler, 3 Keys (N. Y.), 572 166, 170
Rawson *v.* Holland, 59 N. Y. 611 328, 343
Read *v.* Spaulding, 5 Bosw. 395 (Supr. Ct. N. Y., 30 N. Y. 630) 8, 190, 194, 196, 200
v. St. Louis, Kansas City, etc., R. R. Co., 60 Mo. 199 234, 313
Reaves *v.* Waterman, 2 Spears' Rep. S. C. 197 192, 272
Redpath *v.* Vaughan, 52 Barb. (N. Y.) 489, affirmed 48 N. Y. 655 269
Reed *v.* U. S. Express Co., 48 N. Y. 462 337
Regan *v.* Grand Trunk R. Co., 61 N. H. 579 335
Reineman *v.* C. C. & B. R. R. Co., 51 Iowa, 338 410
Relf *v.* Rapp, 3 W. & S. (Pa.) 21 35, 39
Relyea *v.* N. H. Rolling Mill Co., 42 Conn. 579 533
Rennie *v.* Northern Ry. Co., 27 U. C. C. P. 153 340
Reno *v.* Hogan, 12 B. Monroe (Ky.), 63 117, 252
Reynolds *v.* Jex, 7 B. & S. 86; 34 L. J. Q. B. 251 179, 363
Rhodes *v.* L. & N. R. R. Co., 9 Bush (Ky.), 688 117, 220
Rice *v.* Austin, 17 Mass. 197 491
v. I. & St. L. R. R. Co., 3 Mo. App. Rep. 27 23, 377
v. K. P. R. R. Co., 63 Mo. 314 125
Rich *v.* Lambert, 12 How. 347 269, 273
Richards *v.* Doe, 100 Mass. 524 47, 49

SECTION

Richards *v.* Haunen, 1 Fed. Rep. 54; Lawson on Contracts of Carriers, p. 401 100, 267, 273, 321
v. Westcott, 2 Bosworth (N. Y.), 589 10, 39
Richardson *v.* Maine, etc., Ins. Co., 6 Mass. 102 306
v. Northeastern Ry. Co., L. R. 7 C. P. 75 221
v. Smith, 33 Ga. (Supplement) 95 461, 467
v. The Charles P. Chouteau, 37 Fed. Rep. 532 347
Richmond *v.* Union Steamboat Co., 87 N. Y. 240 398, 409
Rickerson, etc., Co. *v.* Grand Rapids, etc., Co., 32 Am. & Eng. Ry. Cases, 487 337
Ricketts *v.* B. & O. R. R. Co., 61 Barb. 18; 59 N. Y. 637 63, 65, 339
Riley *v.* Horne, 5 Bing. 217 100
Ritz *v.* Penna. R. R. Co., 3 Phila. 82 190, 217
Rixford *v.* Smith, 52 N. H. 355 127, 217
Robbins *v.* Welsh, 9 Phila. (Pa.) 409 356
Roberts *v.* Riley, 15 La. Ann. Rep. 103 118
Robertson *v.* Ewer, 1 T. R. 127 206
v. Kennedy, 2 Dana (Ky.), 430 9, 188
Robinson *v.* Memphis, etc., R. Co., 16 Fed. Rep. 57; 9 Fed. Rep. 129 167, 432, 436
v. M. D. T. Co., 45 Iowa, 470 71, 91, 150, 165, 231, 327
v. Southwestern Ry. Co., 19 C. B. N. S. 51; 11 Jur. N. S. 390; 34 L. J. C. P. 234; 13 W. R. 660 36
Rochereau *v.* Bark "Hausa," 14 La. Ann. Rep. 431 243, 252
Rodger *v.* The Comptoir d' Escompte de Paris, L. R. 2 P. C. 393 539

SECTION

Rodgers *v.* Phillips, 40 N. Y. 519 413, 420
Rodocanachi *v.* Milburne, L. R. 18 Q. B. D. 67 73
Rogers *v.* Great Western R'way. Co., 16 Up. Can. Q. B. 389 337, 339, 472
v. Murray, 3 Bosw. 357 285
v. Roberts, 27 La. Ann. Rep. 85 68
v. Wheeler, 6 Lansing, N. Y. 420 343
Rohl *v.* Parr, 1 Esp. 445 272, 299
Rome R. R. *v.* Sloan, 39 Ga. 636 327
v. Sullivan, 25 Ga. 228 329, 343
Root *v.* G. W. R. Co., 45 N. Y. 524 323, 325, 327, 328, 343
Roscow *v.* Corson, 8 Taunt. 684 206
Rose *v.* Des Moines Valley R. Co., 39 Iowa, 246 115
Rosenthal *v.* Dessan, 11 Hun, 49 533, 536
Ross *v.* Hunter, 4 T. R. 33 206, 210
v. R. R. Co., 49 Vt. 364 281
Rowland *v.* Miln, 2 Hilt. (N. Y.) 150 378
Rowley *v.* Bigelow, 12 Pickering, 307 18, 436, 534
Royal Canadian Bank *v.* Grand Trunk Ry. Co., 23 U. C. C. P. Rep. 225 1
Ruck *v.* Hatfield, 5 B. & Ald. 632 465
Russell *v.* Livingston, 19 Barbour, 346 8
v. Niemann, 17 C. B. N. S. 163 73
v. Niemann, 34 L. J. C. P. 10; S. C. 10 L. T. 786; 13 W. R. 93 292
Ryburg *v.* Snell, 2 Wash. C. C. 294 491
Ryder *v.* Hall, 7 Allen (89 Mass.), 456 25, 167

S.

Sach *v.* Ford, 13 C. B. N. S. 90 243
Sager *v.* Portsmouth, etc., R. R. Co., 31 Me. 228 119, 199
Salisbury *v.* Harnden Ex. Co., 10 R. I. 244 293

SECTION

Salomans *v.* Lissen, 2 T. R. 681 537
Saltus *v.* Everett, 20 Wend. 268 167, 460, 461, 467, 470
Sampson *v.* Gazzam, 6 Porter (Ala.), 123 105, 223
v. Lindsay, 6 Porter (Ala.), 123 78, 271
Samuel *v.* Edmonstone, 1 Low. Can. Jur. 89 100
Sandeman *v.* Scurr, 2 L. R. Q. B. 98 244, 252
Sanders *v.* Maclean, 11 Q. B. Div. 327 421, 423, 455, 459
v. Vanzeller, 4 Q. B. 260 441
v. Young, 1 Head (Tenn.), 219 10
Sanderson *v.* Lamberton, 6 Binney (Pa.), 128 163
Sandy *v.* C. & N. W. R. R. Co., 30 Ia. 420 228
Sanford *v.* Housatonic R. R. Co., 65 Mass. 155 395
Sargent *v.* Morris, 3 B. & Ald. 277 441
Satterlee *v.* Groat, 1 Wendell (N. Y.), 272 171
Saunders *v.* Bartlett, 12 Heiskell (Tenn.), 316 479, 491
Savannah, etc., R. R. Co. *v.* Collins, 3 Southeast Rep. 416 21, 69
Savings Bank *v.* R. Co., 20 Kan. 519 168
Sayward *v.* Stevens, 3 Gray (69 Mass.), 97 64, 85, 250
Scaife *v.* Tarrant, 23 W. R. 469; 2 Cent. L. J. 383; affirmed 23 W. R. 840; 2 Cent. L. J. 605 184
Schieffelin *v.* Harvey, 6 Johns. 170; S. C. Anton's N. P. 76 194, 261, 272, 294, 320
Schlesinger *v.* Stratton, 9 R. I. 578 471
Schmidt *v.* Royal Mail S. S. Co., 45 L. J. Q. B. Div. 646 223
v. St'm'p Penn'a, 7 W. N. C. 98 533
School Dist. *v.* B. H. & E. R. R. Co., 102 Mass. 552 121
Scholes *v.* Ackerland, 15 Illinois, 474 400
Schr. Leonidas, Olcott (D. C. N. Y.), 12 183

SECTION

Schuckards *v.* Hall, 36 Md. 590 527
Schulter *v.* Adams Ex. Co., 6 Cent. L. J. 175 345
Schultz *v.* The Pietro G., 40 Fed. Rep. 497 58
Schumacher *v.* Eby, 24 Pa. St. 521 533
Schuster *v.* McKellar, 26 L. J. Q. B. 281 465
Schutter *v.* Adams Ex. Co., 5 Mo. App. 316 328, 329
Schwartz *v.* Dwyer, 3 P. F. S. 335 473
Scothorn *v.* S. S. R. Co., 8 Ex. 341 325
Scott *v.* Hescroff, 5 L. Can. Rep. 274 400
v. Libby, 2 Johnson (N. Y.), 336 297
v. London Dock Co., 34 L J. Ex. 220 215
Scoville *v.* Griffith, 12 N. Y. (Ct. of App.) 509 64, 166
Scranton *v.* Farmers' Bank, 24 N. Y. 424 301
Scripture *v.* Lowell Ins. Co., 10 Cush. (Mass.) 356 225
Scruggs *v.* B. & O. R. R. Co., 5 McCreary, 590 103, 223
Seaman *v.* Adler, 37 Fed. Rep. 268 204
Sears *v.* Wingate, 3 Allen (85 Mass.), 103 15, 167, 180, 432
Security Bank of Minn. *v.* Luttgen, 29 Minn. 363 65, 482, 485
Sedgwick *v.* Cottingham, 54 Iowa, 512 471
Seligman *v.* Armijo, 1 New Mexico, 459 9, 128, 201, 294
Selma & Meriden R. R. Co. *v.* Butts, 43 Ala. 385 7
Sewell *v.* Burdick, L. R. 10 H. L. 74 442
Seymour *v.* Newton, 105 Mass. 275 537
Shackleford *v.* Wilcox, 9 La. Ann. Rep. 33 364
Shatzell *v.* Hart, 2 Marshall (Ky.), 191 25
Shaw *v.* Gardner, 12 Gray (78 Mass.) 488 65, 227, 404
v. Merchants' Nat. Bk. of St. L., 8 W. N. C. (Penna.) 221 63
v. The R. R. Co., 101 U. S. 557 453, 454
v. Thompson, Olcott, 144 364

SECTION

Shaw *v.* Y. N. M. R. Co., 13 Q. B. 347; 18 L. J. Q. B. 181; 13 Jur. 385; 6 Railway Cas. 87 100, 256, 264
Shelton *v.* M. D. T. Co., 59 N. Y. 258 165
Shepard *v.* Heineken, 2 Sweeny (N. Y.), 525 397
Shepherd *v.* Harrison, L. R. 5 H. L. 116; L. R. 4 Q. B. 493; L. R. 4 Q. B. 196 485, 523, 528
v. Naylor, 5 Gray, 591 32, 58
Sherman *v.* Hudson R. Co., 64 N. Y. 254 342
v. Inman S. S. Co., 26 Hun (N. Y.), 107 283
v. Penna R. R. Co., 8 W. N. C. 269 228
v. Wells, 28 Barbour (N. Y.), 403 8
Shieffelin *v.* Harvey, 6 Johns. (N.Y.) 170 194
Shiff *v.* N. Y. C. & H. R. R. Co., 16 Hun, 278 66
Ship Howard *v.* Wissman, 18 Howard, 231 48, 281
Ship Rappahannock *v.* Woodruff, 11 La. Ann. Rep. 698 49
Short *v.* Simpson, L. R. 1 C. P. 248 478
Shriver *v.* S. C. & St. Paul R. R. Co., 24 Minn. 506 123, 347
Shroeder *v.* H. R. R. R. Co., 5 Duer (N. Y. Supr. Ct.), 55 323
Silver *v.* Hall, 2 Mo. App. 557 192
Simkins *v.* N. & L. Steamboat Co., 11 Cush. Mass. 102 336
Simmons *v.* G. W. Ry. Co., 2 C. B. (N. S.) 620 151
v. Law, 8 Bosw. 213; 3 Keys (40 N. Y.), 217 64, 79, 102
Simon *v.* The Fung Shuey, 21 La. Ann. Rep. 363 118, 261
Singleton *v.* Hilliard, 1 Strobt. (S. C.) 203 134, 228
Siordet *v.* Hall, 4 Bing. 607 192
Sioux City & Pac. R. Co. *v.* First Nat. Bk. of Fremont, 10 Nebraska, 556 168, 434
Sisson *v.* Cleveland, etc., R. R. Co., 14 Mich. 489 258
630 Quarter Casks of Sherry Wine, 14 Blatch. (C. C.) 517 251

SECTION

Sjoerds *v.* Luscombe, 16 East, 201 306, 308
Skilling *v.* Bollman, 6 Mo. App. 76 455, 466, 496
Skinner *v.* Hall, 60 Me. 477 328
Skipwith *v.* G. W. R. Co., 59 L. T. N. S. 520 144
Slark *v.* Broom, 7 La. Ann. 337 176
Sleat *v.* Tagg, 5 Barn. & Alderson, 342 39
Slim *v.* Great Northern R. R. Co., 14 C. B. 647 100
Slocum *v.* Fairchild, 7 Hill, 292; 19 Wend. (N.Y.) 329; affirmed 7 Hill (N. Y.), 292 129, 268, 269
Smith *v.* Brazelton, 1 Heisk. (Tenn.) 44 293
v. Horn, 2 Moore, 18; S. C. 8 Taunt. 144 100, 194
v. Hudson, 34 L. J. Q. B. 145 472
v. Louisville, etc., R. R. Co., 86 Tenn. 198 135
v. N. C. R. R. Co., 64 N. C. 235 131
v. New Haven, etc., R. R. Co., 12 Allen (Mass.), 531 220
v. New York Central R. R. Co., 29 Barb. (N. Y.) 132; affirmed 24 N. Y. 222; 43 Barb. 225 238, 328, 343, 346
v. Scott, 4 Taunt. 125 212, 213
v. Shepherd, Abb. on Shipping, pp. 235, 287, 291., ch. iv., sec 2, (10th ed.) 269, 294
v. Tregarthen, 56 L. J. Q. B. 437 16
v. Wright, 1 Carnes, 43 249, 250
Smurthwaite *v.* Wilkins, 11 C. B. (N. S.) 842 356, 442
Smyrl *v.* Niolan, 2 Bail. (S. C.) 421 191
Snider *v.* Adams Exp. Co., 63 Mo. 376 125, 150, 151, 337
Snow *v.* Ind., etc., R Co., 109 Ind. 422 333, 336
S. & N. A. R. R. *v.* Henlein, 56 Ala. 368; 52 Ala. 606 105, 144, 217, 238
Soares *v.* Thomson, 7 Taunt. 627 206
v. Thornton, 7 Taunt. 627 211

SECTION

Soule *v.* Rodocanachi, 1 Newb. Adm. 504 286
Soumet *v.* Nat. Ex. Co., 66 Barb. (N. Y.) 284 150, 165
South, etc., Alabama, etc., R. R. Co. *v.* Henlein, 52 Ala. 606 254
South & North Alabama R. R. Co. *v.* Wilson, 78 Ala. 587 105
Southcote's Case, 4 Rep. 84 100
Southern Exp. Co. *v.* Armstead, 50 Ala. 350 105, 142
Southern Exp. Co *v.* Barnes, 36 Ga. 532 112, 396
Southern Exp. Co. *v.* Caperton, 44 Ala. 101 105, 389, 393
Southern Exp. Co. *v.* Craft, 49 Miss. 480 17
Southern Exp. Co. *v.* Crook, 44 Ala. 468 8, 22, 35, 105, 142, 144, 148
Southern Exp. Co. *v.* Dickson, 4 Otto, 549 414
Southern Exp. Co. *v.* Frink, 67 Ga. 201 8
Southern Exp. Co. *v.* Hess, 53 Ala. 19 8, 17, 346, 347
Southern Exp. Co. *v.* Kaufman, 12 Heisk. (Tenn.) 161 226
Southern Exp. Co. *v.* Moon, 10 George (Miss.), 822 155
Southern Exp. Co. *v.* Newby, 36 Ga. 635 8, 34, 112
Southern Exp. Co. *v.* Palmer, 48 Ga. 85 163, 266
Southern Exp. Co. *v.* Purcell, 37 Ga. 103 112
Southern Exp. Co. *v.* Shea, 88 Ga. 519 329, 330, 380
Southern Exp. Co. *v.* Thornton, 41 Miss. 216 8, 343
Southern Exp. Co. *v.* Urquhart, 52 Ga. 142 344
Southern Exp. Co. *v.* Womack, 1 Heiskell (Tenn.), 256 20, 135, 293, 381
Southwestern Ry. *v.* Webb, 48 Ala. 585 7, 93
Spaids *v.* N. Y. Mail S. S. Co., 3 Daly (N. Y.), 139 295, 296
Spalding *v.* Ruding, 6 Beav. 376; 5 B. & Ad. 817 533, 544, 545, 546
Spears *v.* L. S. & M. S. R. R. Co., 67 Barbour (N. Y.), 513 9

SECTION

Spence *v.* Chadwick, 10 Q. B. 517; S. C. 16 L. J. Q. B. 313; 11 Jur. 872 202, 274, 305, 313
v. Daggett, 2 Vt. 92 194, 275
Speyer *v.* The Mary Belle Roberts, 2 Sawy. 1 276
Spinetti *v.* Atlas S. S. Co., 80 N. Y. 71; S. C. 14 Hun (N. Y.), 100 129, 208, 320
Sprague *v.* West, Abb. Adm. Rep. 548 356
Spring *v.* Haskell, 14 Gray, 309 36
Sproat *v.* Donnell, 26 Maine, 187 64, 85, 86
Sprowl *v.* Kellar, 4 Stew. & P. Ala. 382 193
Squire *v.* N. Y. C. R. R. Co., 98 Mass. 239 101, 121, 159, 165
S. S. Co. *v.* Bason, Harp. L. Reps. (S. C.) 262 192
Stamma *v.* Brown, 2 Str. 1173 (16 Geo. II.) 207
Stanton *v.* Edger, 16 Pick. 476 536
Steamboat Company *v.* Bason, Harp. (S. C.) 262 192, 278
Steamboat John Owen *v.* Johnson, 2 Ohio State, 142 383
Stearine Co. *v.* Heintzemann, 11 L. T. W. S. 272; 17 C. B. N. S. 56; 10 Jur. U. S. 881 1
Stedman *v.* Western Transportation Co., 48 Barb. (N. Y.) 97 226
Steele *v.* McTyer's Adms., 31 Ala. 667 81, 191, 269, 271
v. Townsend, 37 Ala. 247 102, 105, 150, 252
Steelman *v.* Taylor, 3 Ware, 52 379
Steinbach *v.* Ogden, 3 Caines, 1 210
Stephens *v.* Harris, 56 L. J. Q. B. D. 516 316
Stephens Trans. Co. *v.* Tuckerman, 33 N. J. 543; 4 Vroom. (N. J.), 543 9, 267
Stevens *v.* Navigazione Generale Italiana, 39 Fed. Rep. 562 298
Stevenson *v.* Gildersleeve, 2 U. C. C. P. 495 100
Stewart *v.* London, etc., Ry. Co., 3 H. & C. 135 265
v. Merch. Dis. Trans. Co., 47 Iowa, 229 71, 226, 231

SECTION

Stewart *v.* T. H. I. R. R. Co., 3 Fed. (U. S. C. C. Dist. Mo.) 768 328
Stiles *v.* Davis, 1 Black, 101 300, 302
Stinson *v.* New York Central R. R. Co., 32 N. Y. 333 255
Stmr. Missouri *v.* Webb, 9 Mo. 193 47
Stmr. Wisconsin *v.* Young, 3 Green (Iowa), 268 14, 25
Stollenwerck *v.* Thacher, 115 Mass. 224 167, 469, 480, 482, 485
Stone *v.* National Ins. Co., 19 Pick. (36 Mass.) 34 206, 211
v. Swift, 4 Pick. 389 503
Stoneman *v.* Erie R. R. Co., 52 N. Y. 429 34
Story on Bailments, 496, and cases cited 10
Stoughton *v.* Rappalo, 3 S. & R. (Pa.) 559 297
Stoul *v.* St. L. & P. R. Co., 9 Bradwell, 48 432
Strohn *v.* D. & M. R. R. Co., 21 Wis. 554; 23 Wis. 126 141, 151, 174, 184
Strong *v.* Grand Trunk R. R. Co., 15 Mich. 206 26, 31
v. Martin, 1 Dunl. Bell & Mur. Sess. Cas. 1245 211
St. Louis, etc., R. R. Co. *v.* Dorman, 72 Ill. 504 217
St. Louis & I. M. R. R. Co. *v.* Larned, 103 Ill. 293 340
St. Louis I. M. & S. Ry. *v.* Lesser, 46 Ark. 236 106
St. Louis K. C. N. R. Co. *v.* Piper, 13 Kansas, 505 116, 329, 330, 337
St. Louis, etc., R. R. Co. *v.* Smuck, 49 Ind. 302 114, 216, 268, 274
St. Louis, etc., R. Co. *v.* Weakly, 50 Ark. 397 144
St. Louis Natl. Bk. *v.* Ross, 9 Mo. App. 399 496
St. Marc *v.* La Chappella, 1 Martin's La. Rep. 36 297
St. John *v.* Exp. Co., 1 Wood's C. C. Rep. 612 39, 320, 327, 328
St. John *v.* Van Santwood, 25 Wendell (N. Y.), 660 328
S. & M. R. R. Co. *v.* Butts, 43 Ala. 385 334

SECTION

Stuart *v.* Crawley, 2 Stark. 323 221
v. Tennessee M. & F. Ins. Co., 1 Humph. 242 206
Stumore *v.* Breen L. R., 12 App. Cas. 698 182
Sturgeon *v.* St. Louis, etc., R. R. Co., 65 Mo. 569 240, 261
Sturgess *v.* Steamboat Columbus, 23 Mo. 230 352
Suckley *v.* Delafield, 2 Caines, 222 206
Sullivan *v.* Thompson, 99 Mass. 259 410
Summerill *v.* Elder, 1 Binney (Pa.), 106 479
Sumner *v.* Southern R. R. Ass., 7 Baxter (Tenn.), 345 23, 343, 377
Sunderland *v.* Westcott, 2 Sweeney (N. Y. Supr. Ct.), 260 129, 150, 157
Sutton *v.* Kettell, 1 Sprague, 309 25
v. Mitchell, 1 T. R. 18 294
Swanston *v.* Garrick, 2 L. J. N. S Ex. 255 243
Sweet *v.* Black, 2 Sprague's Dec. 49 63
Swift *v.* Pacific, etc., Stms. Co., 106 N. Y. 206 63, 151, 325
Swinburne *v.* Massue, Stewart's L. C. Rep. 569 386
Swindler *v.* Hilliard, 2 Rich. (S. C.), 286 134, 224

T.

Taggard *v.* Loring, 16 Mass. 336 210
Talbott *v.* Merchant's Disp. Trans. Co., 41 Iowa, 247 92
Talcott *v.* Delaware Ins. Co., 2 Wash. C. C. 449 418
Tarbell *v.* Royal Exch., etc., Co., 110 N. Y. 170 400
Tarbox *v.* Eastn. Stmp. Co., 50 Me. 339 49
Tardos *v.* C. St. L. & N. O. R. R. Co., 35 La. Ann. Rep. 15 118
Tardos *v.* Ship "Toulon," 14 La. Ann. Rep. 429 253
Tate *v.* Meek, 8 Taunt. 280 359
Taubman *v.* Pacific Steam N. Co., 26 L. T. N. S. 704 100
Taylor *v.* Chicago & N. W. Ry. Co., 74 Ill. 86 175

SECTION

Taylor *v.* Little Rock, etc., R. R. Co., 39 Ark. 148; 32 Ark. 393 228, 339, 348
v. Liverpool, etc., S. S. Co., 9 L. R. Q. B. C. 546; S. C. 43 L. J. Q. B. 205; 22 W. R. 752; 30 L. T. N. S. 714 319, 320
v. Turner, 87 Ill. 296 479, 516, 519
Thayer *v.* St. Louis, etc., R. Co., 22 Ind. 26 114
The Adriatic, 16 Blackf. C. C. 424 47, 49
The Alexandra, 14 L. J. 742; 14 W. & R. 466; 14 L. T. N. S. 742 242, 243
The "America," 8 Ben. 491 283
The Andover, 3 Blatchford U. S. C. C. Rep. 303 59
The Anna Maria, Adm. Ct. 31 July, 1871 241
The Antionetta C., 5 Ben. 564 272
The Bark Carlotta, 9 Benedict's Rep. 1; 3 Asp. Mar. Law Cas. (N. S.) 456; 3 Kent Comm. 300 74, 298
The Bark Cheshire, 2 Sprague, 28 244
The Bark Colonel Ledyard, 1 Sprague, 530 243, 244
The Bark Edwin, 1 Sprague Dec. (D. C. Mass.) 477 18, 180
The Bark Fangier, 3 Ware, 110 400
The Bark "Gentleman," Olcott's Adm. 110; S. C. 1 Blatch. 196 285
The Bark Whistler, 2 Sawyer (U. S. S. Ct.), 348 36
The "Barraconta," 40 Fed. Rep. 498 252
The Belfast *v.* Boon, 41 Ala. 50 290, 294
The Bellona, 4 Ben. 503 103
The Bergenseren, 36 Fed. Rep. 700 267
The Bernina, L. R. 12 P. D. 36 269
The Bird of Paradise, 5 Wall. 545 359
The "Bohemia," 38 Fed. Rep. 756 309
The Boston, 1 Lowell, 464 400, 403
The Brantford City, 29 Fed. Rep. 373 267

SECTION

The Brig "Collenberg," 1 Black, 170 283
The Brig Sloga, 10 Benedict, U. S. D. C., N. Y. 315 75
The "Burgundia," 29 Fed. Rep. 607 252
The California, 2 Sawyer's Rep. (D. C. Oregon) 12 51, 57
The Carlotta, 3 Asp. Mar. Law Cas. N. S. 456; 4 Irish Jur. 237; also in 9 Benedict Rep. 1; 3 Kent's Comm. 300 74, 272, 298
The Casco, Davies, 184 273
The Chasca, L. R., 4 Adm. 446; S. C. 44 L. J. Adm. 17 272
The "City of Austin," 2 Fed. Rep. 412 400
The "City of Norwich," 3 Ben. 575 103, 224
The "Collenberg," 283
The Columbo, 3 Blatchford C. C. Rep. 521 55, 59
The Compta, 4 Sawyer, 375 273, 276
The "Connaught," 32 Fed. Rep. 640 252
The Convoy's Wheat, 3 Wallace, 225 343
The Costa Rica, 3 Sawyer, 538 276
The "David and Caroline," 5 Blatch. 266 103, 252
The Delaware, 14 Wallace, 579, 601 1, 3, 9, 13, 15, 18, 44, 65, 69, 86, 150, 239, 250
The Delhi, 4 Ben. 345 103, 253
The Ebenezer, 2 W. Rob. 206 215
The Eddy, 5 Wallace, 481 359, 400, 401
The Edwin, 1 Sprague, 477 272
The Energie, 2 Asp. Mar. Law Cases, 296 59
The Enrique, 5 Hughes, 275 250
The Emily *v.* Karney, 5 Kansas, 645 150, 228
The Emma Johnson, 1 Sprague, 527 273
The Ethel, 5 Ben. 154 272
The Express, L. R. 3 Adm. & Ecc. 599 306
The Farwell, 8 Biss. 61 436
The "Favorite," 2 Biss. 502 269
The Filia Maggiore, 2 L. R. Adm. 106 243, 244, 246, 442
The Friendschaft, 3 Wheaton, 14 419

SECTION

The Freedom, L. R. 3 C. P. 594 49, 242, 272, 273, 442
The Galley of Lorne, Mit. Mar. Reg. Feb. 11, 1876; Leggett on Bills of Lading, p. 179 204
The Gazelle, 128 U. S. 474 73
The Goldhunter, Blatch. & H. 300 272
The "Gratitudine, 3 Rob. Ad. 240, 260 285
The Halley, 2 L. R. Adm. & Ec. 10 99
The Hamburg, 33 L. J. (N. S.) Adm. 116 288
The Heinrich, 3 L. R. Adm. 424 292
The "Helen," 15 W. R. 202; 12 Jur. (N. S.) 675; 4 Moore P. C. C. (N. S.) 70; B. & L. 429; 14 L. T. N. S. 863 251
The "Hudson," 11 La. Ann. 427 201
The Huntress, Davies, 82 259, 269
The Ida, 32 L. T. N. S. 541 60
The Idaho, 93 U. S., 3 Otto 575 18, 436, 437, 461, 464, 468
The "Invincible," 1 Lowell Decisions, 225; 3 Sawyer, 176 103, 251, 284
The Isabella, 8 Ben. 139 272
The "Jefferson," 31 Fed. Rep. 489 252
The J. W. Brown, 1 Bissell (C. C.), 76 14, 25
The John Bellamy, L. R. 3 Ad. 129 418
The John K. Shaw, 32 Fed. Rep. 491 181, 515
The Joseph Grant, 1 Biss. 193 432
The Juniata Paton, 1 Biss. 15 192, 270
The Karo, 29 Fed. Rep. 652 73
The Kathleen, 43 L. J. Adm. 39 212
The Kensington, 24 La. Ann. Rep. 100 203
The Keokuk, 1 Biss. 522 269, 275
The Keystone, 31 Fed. Rep. 412 322
The Lady Franklin, 8 Wallace, 325 14, 16, 25, 65, 167, 428, 432
The "Lady Pike," 2 Biss. 141 269
The Lizzie, L. R. 2 Adm. 254 288
The Loon, 7 Blatch. C. C. Rep. 244 167, 180, 432
The "Lynx" *v.* King, 12 Mo. 272 286
The Magellan Pirates, 25 Eng. Law & Eq. Rep. 595 290

SECTION

The Maggie Hammond, 9 Wall. 435 190, 194, 199
The Maggie M., 30 Fed. Rep. 692; 31 Fed. Rep. 610 322
The "Martha," 3 Olcott's Adm. 140 321
The Mary Ann Guest, 1 Blatchf. 358 533
The Mary Belle Roberts, 2 Sawy. 1 276
The Mary and Susan, 1 Wheat. 25 471
The Mary Stewart, 2 W. Rob. 463 215
The May Queen, 1 Newb. 465 103
The Milan, 31 L. J. Adm. 111 215
The Miletus, 5 Blatchf. C. C. 335 272, 299
The Milwaukee Belle, 2 Bissel, 197 249
The Miranda, 41 L. J. Adm. 82 204
The Mohawk, 8 Wallace, 153 272
The Mollie Mohler, 2 Bissell, 505; affirmed 21 Wall. 230 269
The Nathaniel Hooper, 3 Summ. 512 378
The Nepoter, 38 L. J. Adm. 63 242, 251
The Neptune, 16 L. T. N. S. Adm. 36; 6 Blatchf. 193 239, 247, 269
The Newark, 1 Blatch. 203 273
The New Jersey, Olcott, 444 212, 269
The New World *v.* King, 16 How. 469 103
The "Niagara" *v.* Cordes, 21 How. 7 267, 285
The Nith, 36 Fed. Rep. 383 321
The Nitro-glycerine Case, 15 Wall. 524 246
The Northern Bell, 1 Biss. 529 267, 273
The "Norway," 8 Moore P. C. C. (N. S.) 245; 12 L. J. (N. S.) 57 283, 288, 376
The Ocean Queen, 2 Asp. Mar. Law Cas. 419; 1 W. Robinson, 457 215
The Ocean Wave, 3 Biss. 317 275
The Olbers, 3 Ben. 148 49, 253
The Onrust, 1 Ben. 431 301
The Oriflamme, 1 Sawyer C. C. 176 51, 252
The Pacific, Deady (D. C.), 17 49, 103, 130, 161

SECTION

The Patria, 3 L. R. Adm. 436; S. C. 1 Asp. Mar. Law Cas. 71; 41 L. J. Adm. 23 (Ct. of Adm.) 74, 95, 274, 292
The Pennsylvania Co. *v.* Fairchild, 69 Ill. 260 91
The Peter der Grosse, 34 L. T. N. S. 749; 1 L. R. Prob. Div. 414 45, 62
The Peytona, 2 Curtis, 21 239, 250
The Phebe, 1 Ware's Rep. (D. C. Me.) 263 64
The Phila. and Reading R. R. Co. *v.* Northam, 2 Benedict, 1 400
The "Polynesia," 30 Fed. Rep. 210 252, 253, 267
The Port Adelaide, 38 Fed. Rep. 753 409
The Portsmouth, 9 Wall. 682 248, 269
The Propeller Mohawk, 8 Wall. 153 192, 351
The Prosperino Polasso, 29 L. T. N. S. 622 45, 60
The Rebecca, 1 Ware, 188 273
The Reeside, 2 Sumner, 567 192, 267, 271, 273
The Rocket, 1 Biss. 354 103, 269
The San Roman, L. R. 3 Adm. 583 74
The Santee, 7 Blatchford, 186; 2 Ben. 519 395, 400, 402
The Sargossa, 2 Ben. 544 180
The Schr. Freeman *v.* Buckingham, 18 Howard, 182 15, 167, 176, 178, 180, 428, 432
The "Scotland," 105 U. S. 24 233
The Shannon, 1 W. Rob. 463 215
The Ship Ben Adam, 2 Benedict, 445 400, 408
The Ship Black Hawk, 9 Benedict (U. S. D. C.), 207 49
The Ship Howard *v.* Wissman, 18 How. 231 282
The Ship "Invincible," 3 Sawyer, 176 283
The Ship Zone, 2 Sprague, 19 50
The Sidonian, 34 Fed. Rep. 805; S. C. 35 Fed. Rep. 534 65
The "Spring," 29 Fed. Rep. 397 273
The "Star of Hope," 17 Wall. 651; 2 Sawyer's Rep. 15 70, 243, 269, 322
The Steamship "Pereire," 8 Ben. 301 253

SECTION

The Steamship Ville de Paris, 3 Benedict, 276 400, 406
The Stettin, L. R. 14 P. D. 142 414
The St. Cloud, Brow. & L. Adm. 4 244
The St. Jose Indiana, 3 Wheat. 14; 1 Wheat. 208 419, 484
The Sultana *v.* Chapman, 5 Wis. 454 151
The Sun Mutual Insurance Co. *v.* The Miss. Trans. Co., 4 McCrary, 636 213
The Tangier, 32 Fed. Rep. 230 375
The Teutonia, 3 L. R. Adm. 394; S. C. 24 L. J. (N. S.) 21; 1 Asp. Mar. Law Cas. 32; S. C. on Appeal, 2 L. R. 4 P. C. 71 292, 306
The Thames, 14 Wall. 98 414, 427, 493
The Thomas Newton, 41 Fed. Rep. 106 190
The Tigress, 32 L. J. Adm. 97 458
The Tybee, 1 Woods, 358 398
The Velona, 3 Ware, 139 378
The Venus, 8 Cranch, 253 480
The Victor, 29 L. J. Adm. 110; 2 L. T. (N. S.) 331 215
The Volunteer, 1 Sumner, 551 359
The Waldo, 2 Ware's Reps. 165 88
The Wanderer, 29 Fed. Rep. 260 69
The War Eagle, 6 Bissell, 364 103
The Wellington, 1 Bissell, 279 85
The Wilhelm Schmidt, 25 L. T. (N. S.) 34 292
The Willard, 28 Fed. Rep. 759 267
The Woodrop, 2 Dod's Adm. Rep. 83 212
The Zollverein, Swab. 98 99
Thomas *v.* Ship "Morning Glory," 13 La. Ann. Rep. 269 118, 252
v. Snyder, 3 Wright (Pa.), 317 363, 369, 378
Thompson *v.* C. & N. W. Ry. Co., 27 Ia. 561 252, 261
v. Downing, 14 M. & W. 403 441, 493
v. Fargo, 63 N. Y Ct. of App. 479 159
v. Trail, 2 Car. & P. 334 465
v. Whitmore, 3 Taunt. 227 273

SECTION

Thorington *v.* Smith, 8 Wall. 1 293
Thorman *v.* Burt, 54 L. T. (N. S.) 349 73, 167, 182
Thorogood *v.* Marsh, 1 Gow. N. P. C. 105 223
Thrift *v.* Youle, 46 L. J. C. P. 402 251, 321
Thurman *v.* Wells, Fargo & Co., 18 Barbour (N. Y.), 500 169
Thurston *v.* Columbian Ins. Co., 3 Caines (N. Y.) 89 207
Tiedman *v.* Knox, 53 Md. 612 167, 454
Tierney *v.* N. Y. C. & H. R. R. Co., 67 Barbour (N. Y.), 538 48
Tilden *v.* Minor, 45 Vt. 195 510
Tindal *v.* Taylor, 4 El. & Bl. 219 180, 441
Tio *v.* Vance, 11 La. 199 351
Tison *v.* Howard, 57 Ga. 410 491
Todd *v.* Ritchie, 1 Stark. 190 207
Torrance *v.* Smith, 3 Upper Canada, C. P. 411 232
Torrey *v.* Corliss, 33 Me. 333 471
Toumlin *v.* Anderson, 1 Taunt. 227 208
v. Inglis, 1 Camp. 421 208
Touteng *v.* Hubbard, 3 B. & P. 293 308
Traders' Bank *v.* Farmers & Mechanics' Bank, 60 N. Y. 40 461
Transportation Co. *v.* Downer, 11 Wallace, 129 216, 268, 273
Trask *v.* Duvall, 4 Washington, 181 366
Trent., etc., S. Nav. Co. *v.* Wood, 3 Esp. 127; S. C. 4 Doug. 287 294
Tuckerman *v.* Trans. Co., 3 Vroom (N. J.), 320 194
Tudor *v.* Macomber, 14 Pickering (31 Mass.), 34 33, 64
Tully *v.* Terry, Law R. 8 C. P. 684; S. C. 42 L. J. C. P. 240 60
Turnbull *v.* Citizens' Bank, 4 Woods, 192 398, 399
Turner *v.* Ship Black Warrior, 1 McAllister, 181 47
v. Trustees of Liverpool Docks, 6 Ex. 543 487, 528
Turney *v.* Wilson, 7 Yerger (Tenn.), 340 81, 268, 269, 275
1265 Vitrified Pipes, 14 Blatchf. 274 400
Tysen *v.* Moore, 56 Barb. (N. Y.) 442 267

SECTION

T. W. & N. Ry. Co. *v.* Hamilton, 76 Ill. 393 254
T., W. W. Ry. Co. *v.* Lockhart, 71 Ill. 627 329
T., P. & W. R. R. Co. *v.* Merriman, 52 Ill. 123 326
T. & P. R. Co. *v.* Rogers, 3 Southwest Rep. 660 339

U.

Union Express Company *v.* Graham, 26 O. St. 595 132, 223, 228
Union Express Co. *v.* Ohleman, 92 Pa. St. 323 226
Union Ex. Co. *v.* Shoop, 4 Norris (Pa.) 325 324
Union Mutual Ins. Co. *v.* Indianapolis, etc., R. R. Co., 1 Disney (O.), 480 223, 272
Union R. R. & Trans. Co. *v.* Riegel, 23 P. F. Smith (Pa.), 72 68
Union Steamboat Co. *v.* Knapp, 73 Ill. 506 226, 228
Union Transportation Co. *v* Yeager, 34 Ind. 1 167, 461
U. S. *v.* Hall, 2 Wash. C. C. 366 269, 274
United States *v.* Jones, 3 Wash. C. C. 209 419
United States *v.* Kimball, 13 Wallace, 636 72
United States *v.* Palmer, 3 Wheaton, 610 290, 293
United States *v.* Power, 6 Mon. T. 271 266, 272
U. S. Express Company *v.* Backman, 28 O. St. 144 144, 149, 223, 228
U. S. Exp. Co. *v.* Haines, 67 Ill. 137 150, 153, 158, 329
United States Ex. Co. *v.* Harris, 51 Ind. 127 114, 348, 387, 393
United States Express Co. *v.* Keefer, 59 Ind. 263 382
United States Ex. Co. *v.* Rush, 24 Ind. 403 328
U. S. & N. I. R. Co. *v.* Heaton, 37 Ind. 448 114
Unnevehr *v.* Stm. Hindoo, 1 Fed. Rep. 627 144

SECTION

V.

Vail *v.* Pacific R. R. Co., 63 Mo. 230 190, 196, 234
Vallé *v.* Carré, 36 Mo. 575 476, 491
Valleys *v.* Wheeler, 1 Cowper, 143 205, 207
Van Etlen *v.* Newton, 25 N. Y. St. Rep'r 751 356
Van Horn *v.* Taylor, 7 Rob. (La.) 201; 2 La. Ann. Rep. 587 212, 213, 215, 269, 275
Van Santwood *v.* St. John, 6 Hill (N. Y.), 157 328
Van Syckel *v.* The Thomas Ewing, 3 Clark (Pa.), U. S. C. C. 231; S. C. Crabbe, 405 248, 269
Van Winkle *v.* Adams Ex. Co., 3 Robertson, 59 382
v. U. S. Mail Co., 37 Barb. 122 300
Vaughan *v.* 630 Casks Sherry Wine, 7 Benedict's Repr. 506 45, 49
Vernard *v.* Hudson, 3 Sumner, (U. S. C. C.), 405 54
Verner *v.* Sweitzer, 8 Casey, 208; 32 Pa. St. 208 102, 133, 151
Vertue *v.* Jewell, 4 Campbell, 31, 491, 492, 537
Virginia, etc., R. R. Co. *v.* Sayers, 26 Grattan, 328 138
Vitrified Pipes, 14 Blatch. 274 378
Vitrified, etc., Sewer Pipes, 5 Ben. 402 252
Vos *v.* United Ins. Co., 2 Johns. Cas. 180 206
Vose *v.* Morton, 5 Gray (71 Mass.), 594 358
Vroman *v.* A. M. W. Ex. Co., 5 N. Y. S. C. 22 144

W.

Wabash & Western R. R. Co. *v.* Elliot, 76 Ill. 67 169
Wade *v.* Hamilton, 30 Ga. 450 491
Wahl *v.* Holt, 26 Wis. 703 329
Waite *v.* Baker, 2 Exr. 1 500, 529
Waldron *v.* Romaine, 22 N. Y. 386 472
Walker *v.* Cassaway, 4 La. Ann. Rep. 19 354
v. London Ry. Co., Kingston Spring Assizes (1843), cited in Walf, Sum. of Law of Railways, 305 217

SECTION

Walker *v.* Skipwith, Meigs, Tenn. 502 135, 172
v. The State, 9 Tex. App. 39 471
v. Transportation Co., 3 Wall. 150 36, 81, 232
Wallace *v.* Clayton, 42 Ga. 443 190, 194, 200
v. Matthews, 39 Ga. 617 63, 112
v. Sanders, 42 Ga. 486; 50 Ga. 134 112, 155, 261, 295
v. Vigus, 4 Blackford (Ind.), 260 17
Walley *v.* Montgomery, 3 East, 585 472
Wallingford *v.* Columbia, etc., R. R. Co., 26 S. Car. 258 134, 343
Walpole *v.* Bridges, 5 Blackf. (Ind.) 222 188, 191, 201, 202
Walter *v.* Brewer, 11 Mass. 99 429
v. Ross, 2 Wash. C. C. 283 493
Ward *v.* Wood, 13 Mass. 539 206, 209
Warden *v.* Greer, 6 Watts (Ga.), 424 48, 241, 282
Wareham Bank *v.* Burt, 5 Allen (Mass.), 113 382
Warhus *v.* Savings Bank, 21 N. Y. 543 151
Warner *v.* Western Trans. Co. 5 Robertson (N. Y. Supr. Ct.), 490 35, 39
Warren *v.* Henderson, 8 Lower Canada, 108 353
v. Sproule, 2 Marsh, 528 533
v. Wilson, 6 Upper Canada Q. B. O. S. 435 190
Wart *v.* A. & S. R. R. Co., 5 Lansing (N. Y.), 475 175
Watkins *v.* Paine, 57 Ga., 50 471
Watkinson *v.* Laughton, 8 Johns. (N. Y.) 213 294
Watson *v.* M. & C. R. R. Co., 9 Heiskell (Tenn.), 255 170
v. Yates, 10 Martin's La. Rep. 687 33
Watts *v.* The Saxon, 11 La. Ann. Rep. 43 325, 326
Wayland *v.* Moseley, 5 Ala. 430 14, 63, 64, 105, 369
Wayne *v.* Str. Gen. Pike, 16 Ohio, 421 64, 82, 398
Webb *v.* Anderson, Taney, 504 359

SECTION

Weed *v.* Barney, 45 N. Y. 344 382
v. Panama R. R. Co., 17 N. Y. 362 313
v. S. & S. R. R. Co., 19 Wend. (N. Y.) 534 325, 327
Weguelin *v.* Cellier, L. R. 6 H. L. 286 364, 379
Weil *v.* Express Co., 7 Phila. Rep. 88 42
Weinberg *v.* A. & R. R. R. Co., 91 N. C. 31 131
Weir *v.* Express Co., 5 Phila. Rep. 355 388
Welch *v.* B. & A. R. R. Co., 41 Conn. 333 109
Wells *v.* Am. Express Co., 44 Wis. 342 414
v. Oregon, etc., Ry. Co., 32 Fed. Rep. 51 414
v. Stm. Nav. Co., 8 N. Y. 375 261
Welsh *v.* Gossler, 11 Abb. Law Cases, 452 521
v. P., Ft. W. & C. R. R. Co., 10 Ohio St. 65 132, 217, 219, 228
Wentworth *v.* Ship Realm, 16 La. Ann. Rep. 18 59
Wernwag *v.* P., W. & B. R. R. Co., 117 Pa. 46 343, 414
Wertheimer *v.* Pennsylvania R. R. Co., 17 Blatchf. 421; 8 W. N. C. (Pa.) 272 150, 223, 228, 229, 316
West *v.* Stm. Berlin, 3 Iowa, 532 45, 49, 68, 190
Westcott *v.* Fargo, 63 Barb. (N. Y.) 349; 61 N. Y. 542 129, 261, 392
West Manufac. Co. *v.* "Guiding Star," 37 Fed. Rep. 641 252
West. R. Co. *v.* Little, 86 Ala. 159 105
W. Mfg. Co. *v.* P. W. R. R. Co., 113 Mass. 490 328
Western, etc., R. R. Co. *v.* McElwee, 6 Heisk. 208 329
Western Trans. Co. *v.* Barber, 56 N. Y. 544 412, 468
Western Union Tel. Co. *v.* Graham, 1 Col. 230 108
W. T. Co. *v.* Newhall, 24 Ill. 466 113, 153, 157
Wetzell *v.* Dinsmore, 54 N. Y. 496 147
Wetzler *v.* Collins, 70 Me. 290 14, 47

SECTION

Weyand *v.* Atchinson, etc., R. Co., 75 Iowa, 573; 30 Am. & Eng. R. Cases, 102; S. C. 33 Northwest, 133 414, 455, 495
Wheeler *v.* S. F. & A. R. R. Co., 31 Cal. 46 323
v. St. L. & S. R. Co., 3 Mo. Appeal R. J. 359 72, 400, 415
Whicher *v.* Steamboat Ewing, 21 Iowa, 240 235
White *v.* Ashton, 51 N. Y. 280 64, 65
v. Colorado Central R. R. Co., 5 Dillon, 428 226
v. Gardner, 5 L. & Eq. R. 375 533
v. G. T. Co., 46 Wis. 493 151
v. Steamer Kate Dale, 16 La. Ann. Rep. 172 352
v. Van Kirk, 25 Barbour (N. Y.), 16 14, 64, 65
Whitehead *v.* Wilmington, etc., R. Co., 9 Am. & Eng. Cas. 168 348
v. W. & W. R. R. Co., 87 N. C. 225 131
Whitesell *v.* Crane, 8 Watts & Sergeant, 269 133
Whitesides *v.* Russell, 8 W. & S. (Pa.) 44 266, 275, 351
v. Thurkill, 12 S. & M 599 213
Whitney *v.* Gauche, 11 La. Ann. Rep. 432 49
Whitworth *v.* Erie R. R. Co., 87 N. Y. 414; 6 Am. & Eng. R. R. Cas. 349 223, 348
Wichita Bank *v.* A. T. & S. R. Co., 20 Kan. 519 434
Wiggin *v.* Amory, 14 Mass. 1 205, 207
v. Boston & Albany R. R. Co., 120 Mass. 201 29
Wiggins *v.* Erie R. R. Co., 5 Hun (N. Y.), 185 165
Wilby *v.* W. C. R. Co., 2 H. & N. 703 325
Wilcocks *v.* Union Ins. Co., 2 Binn. (Pa.) 574 205, 206
Wilcox Silver Plate Co. *v.* Green, 72 N. Y. 20 472
Wilcox *v.* Parmelee, 3 Sanford (N. Y.), 610 337
Wilde *v.* Merchants' Dispatch Trans. Co., 47 Ia. 272 63, 231

SECTION

Williams *v.* Branson, 1 Murphey (N. C.), 417 131, 275
v. East India Co., 3 East, 192 246
v. Grant, 1 Conn. 487, 492 185, 188, 191, 194, 275
v. M. & W. R. R. Co., 93 N. C. 42 167, 432
v. Vanderbilt, 28 N. Y. 217 199
Willis *v.* Grand Trunk R. R. Co., 62 Me. 488 119
Wilmerding *v.* Hart, Hill & Denio (Suppl.), 305 518, 520, 530
Wilson *v.* Adams Exp. Co., 27 Mo., App. 360 414
v. Chesapeake, etc., R., 21 Gratt. (Va.) 654, 138, 345
v. General Mutual Ins. Co., 12 Cush. 66 (Mass.) 360 210
v. Hamilton, 4 O. St. 723 217, 220
v. Harry, 8 Casey (Pa.), 270 348
v. N. Y. C. & N. R. R. Co., 27 Hun, 149 129
v. Xantho, L. R. 12 App. Cas. 503 213
Wiltse *v.* Barnes, 46 Iowa, 210 382
Wing *v.* N. Y. & Erie R. R. Co., 1 Hilton (N. Y.), 235 234
Winston *v.* Cox, 38 Ala. 268 404
Winter *v.* Cort, 7 N. Y. 288 491
Winterport G. & B. Co. *v.* Schr. Jasper, 1 Holmes, 99 32
Wisconsin Ins. Co. *v.* The Bank, 21 Up. Can. Q. B. 284; affirmed 2 Up. Can. Error and Appeal Rep. 282 521, 525
Wise *v.* Great Western R'way Co., 25 L. J. Ex. 258; 1 H. & N. 63 100, 222
Wiseman *v.* Vandeputt, 2 Vernon, 202 532
Witbeck *v.* Holland, 55 Barb. (N. Y.) 443 350
v. Schuyler, 44 Barb. (N. Y.) 469 9, 177
Wolf *v.* American Express Co., 43 Mo. 421 193, 234
v. Dietzsch, 75 Ill. 205 471

SECTION

Wolf *v.* Hough, 22 Kansas, 659 360
v. Meyers, 3 Sanford, 7 2, 64
Wood *v.* Perry, 1 Wright (Ohio), 240 14, 48
v. Str. Fleetwood, 27 Mo. 159 372
Woodburn *v.* Railroad Co., 40 Fed. Rep. 731 151
Wooden *v.* Austin, 51 Barb. 9 261
Woodruff *v.* Nashville, etc., R. Co., 2 Head (Tenn.), 87 479, 491
v. Sherrard, 9 Hun (N. Y.), 322 151
Woolcip & Curties, 1 Inst. 89 a; 1 Roll's Abr. 2; Actions sur Case, c. pl. 4 294
Woolsey *v.* Cenas, 1 Martini (La.), 26 480
Wooster *v.* Tarr, 8 Allen (Mass.), 270 368
Worth *v.* Edmonds, 52 Barb. (N. Y.) 40 190
Wright *v.* Campbell, 4 Burrow, 2051 493
v. Cluxton, 31 U. C. Q. B. 246 411
v. Gaff, 6 Ind. 416 114, 261
v. Holcombe, 6 U. C. C. P. Rep. 531 83
v. N. C. R. R. Co., 8 Phila. 19 344
Wyld *v.* Pickford, 8 M. & W. 443 100
Wyman *v.* C. & A. R. R. Co., 4 Mo. App. Rep. 35 323, 328, 329

Y.

York Co. *v.* Central R. R., 3 Wall. 107 103, 159, 223
Young *v.* East Ala. R. Co., 80 Ala. 100 461
v. Moeller, 5 E. & B. 755 356

Z.

Zerega *v.* Poppe, 1 Abbott Adm. 397 49, 253
Zipsy *v.* Hill, Foster & Finlason, 573 180

INDEX.

[REFERENCES ARE TO THE SECTIONS.]

ACCEPTANCE:
of the bill by shipper is assent to its terms, 150.
shipper should read bill before accepting, 151, 152, 153, 154, 155, 156.
assent is presumed where shipper is familiar with terms of bill, 158.
authority of agent delivering goods to bind shipper, 159.
ACCIDENTS OF ENGINES, effect of exception, 204.
ACCIDENTS OF MACHINERY, meaning of exception, 204.
ACCIDENTS OF STEAM, effect of exception, 203.
ACT OF GOD:
is not excluded by expressed exceptions, 184.
definition, 188, 189.
losses within the exception, 190, 191.
losses not within the exception, 192.
act of God the proximate cause, 193.
negligence and act of God concurring, 194, 195.
delay and act of God concurring, 196.
deviation and act of God concurring, 197, 198, 199.
duty to protect goods after damage by, 200.
inevitable accident not synonymous with, 201, 202.
may include loss by jettison, 247.
ADVERTISEMENT, limitation of liability to a specific amount by, 142.
AGENT:
authority of agent delivering goods to bind shipper, 159.
knowledge of agent as to manner of shipping is knowledge of shipper, 160.
contract made by agent in his own name benefits real owner, 162.
principal must adopt agent's contract as a whole, 163.
carrier having dealt with agent cannot deny agent's authority, 164.
effect of shipment by agent of consignee, 165.
bill executed by agent of carrier, 166.
agent not authorized to sign bill for goods not received, 167, 168.
agent of carrier must be authorized to sign bills, 169, 170, 171.
instructions to carrier's agent do not bind shipper, 172.
effect of agreement by agent to make immediate delivery, 173.
limitation of agent's power to make special contract, 173.

AGENT—(*continued*).
agreement of ticket or passenger agent to watch for arrival of goods, 175.
personal responsibility for making contract beyond authority, 175.
carriers other than the first of a series are the agents of the first under bill for through carriage, 324.
where bill says privilege of reshipping second carrier has lien on goods for freight, 354.
carrier not liable on bill issued by agent without receiving goods, 428, 429, 430.
unauthorized delivery of bill by an agent confers no title, 469.
exception where apparent ownership is intended, 470.
making goods deliverable to vendor's agent is *prima facie* evidence of intention to reserve *jus disponendi*, 484.
"ALL RAIL," omission of these words from bill, 67.
AMBIGUITY, parol testimony admissible to explain, 69.
ASSENT:
acceptance of bill by shipper assent to its terms, 150 *et seq.*
not presumed as to limitations indorsed on the bill, 157.
presumed where shipper is familiar with terms of bill, 158.
ASSIGNEE:
master estopped from denying truth of statements in bill, as against assignee for value when acting within scope of his authority, 180.
of bill for value, liable for freight, 366.
assignee of bill agent of owners not liable for freight, 367.
carrier not liable to, on bill issued by agent without receiving goods, 428 *et seq.*
bills of lading act in England, 430.
ASSOCIATION OF CARRIERS, effect of such association upon their liability, 345, 346.
AT SHIP'S RISK, meaning of exception, 318.

BANK BILLS, are not "goods, freight," etc., 21.
BARRATRY:
definition of, 205.
effect of exception, 205.
acts held to be barratrous, 206.
loss by not covered by exception perils of the sea, 272.
BILLS OF LADING:
definition of, 1.
what are not, 2.
kinds of, 3.
contents of, 4.
original parties to, 5.
by whom given, 6.
contracts for diminished liability, 11.
offices of the bill, 13.

BLOCKADE. See Restraint of Princes.
attempting to run, is barratrous act, 206.
BOATS. See Risk of Boats.
BREAKAGE:
meaning of, exception, 251.
effect of negligence on the exception, 253.

CAPTION, is a part of the bill, 71.
CARRIER:
benefit of limitation of liability to specific sum, to carriers other than the one giving the bill, 145.
bill executed by agent of, 166.
liability on bills signed for goods not received, 167, 168.
agent of, must be authorized to sign bill in order to bind the carrier, 169, 170, 171.
instructions to carrier's agent will not bind shipper, 172.
effect of agent's agreement to make immediate delivery, 173.
limitation of agent's power to make special contract, 174.
obligation to feed and water live stock, 254.
obligation to furnish proper means of transportation, 256, 257, 258.
duty to protect goods after damage by perils of the sea, 278.
right of carrier by land to sell perishable goods, 289.
obligation of, when legal seizure is made of goods, 301.
may contract to carry beyond his own line, 323.
other than the first is agent of the latter, 324.
first carrier liable to destination, 325.
first carrier may limit liability to his own line, 326.
contract to carry beyond carrier's own line expressed or implied, 327.
receipt of goods marked to be delivered beyond carrier's own line, 328.
receipt of such goods by one of an association of carriers, 329, 330.
intermediate carrier must deliver to next succeeding carrier, 342.
carrier in possession of goods when destroyed, liable, 343.
carrier may show in defence misconduct of preceding carrier, 344.
association of carriers for through transportation, 345.
to hold final carrier, delivery to first carrier in good condition must be shown, 346.
limitation of liability in bill of first carrier enures to succeeding carriers, 348, 349.
succeeding carriers not benefited by contract of first carrier may enure to the latter's behalf, 350.
refusal to give bill unless freight previously paid, 363.
duty as to delivery under bill for goods shipped C. O. D., 382, 383, 384, 385.
delivery by vessel at wharf, 400–406.
wrong delivery by vessel, 407–409.
delivery by carrier on land, 410.

CARRIER—(*continued*).
not liable on bill issued for goods not received, 428–435.
statutes provide that bill shall be conclusive evidence of receipt of goods, 435.
may be compelled to disregard his bailor's title and recognize that of true owner, 464.
manner in which bailor obtains possession of goods, whether fraudulently or in good faith material, 466, 467, 468.
when carrier need require no indorsement of bill to warrant delivery, 495.
right to limit common law liability. See LIMITATION.
CHARGES, construction of the phrase, 358.
CHARTER PARTY:
reference to terms of, in bill of lading, 73, 74.
obligations of owners as to stowage, 244.
provision in, respecting demurrage, 357.
"CLEAN" BILL:
definition, 3.
imports that goods are to be stowed on deck, 85.
parol evidence to vary such bill inadmissible, 85.
C. O. D.:
testimony to explain meaning of, admissible, 69.
authority of agents of carriers to contract C. O. D., 173.
carrier's duty under bill for goods so shipped, 382, 383, 384, 385.
COLLATERAL SECURITY. See PLEDGEE.
COLLISION:
loss by, is not by act of God, 192.
is said to be included in perils of the sea, 212.
conditions under which collision may arise, 212, 213.
duty to protect goods after collision, 214.
not presumptively due to negligence, 215.
COMMON CARRIERS, who are, 7, 8, 9, 10. See CARRIER.
CONFEDERATE INSURGENTS, held public enemies, 293.
CONFLICT OF LAWS:
general rules as to the law that governs construction of bill, 89–99.
CONNECTING CARRIERS. See CONTRACT, CARRIER.
CONSIGNEE:
goods sent to two consignees jointly, delivery to either is delivery to both, 414.
bill of lading is *prima facie* evidence of his title, 417.
the bill constitutes evidence of insurable interests, 418.
bill *prima facie* evidence of his title, 471, 472, 473, 474.
prima facie owner though carrier paid by consignor, 475.
may sue without delivery of bill when consignor releases title, 477.
or upon reindorsement of bill, 478.
consignment not conclusive evidence of title in consignee, 479, 480, 481.
pledgee's rights are paramount to those of consignee, 516, 517, 518.

CONSIGNEE—(*continued*).
agreement with shippers shall be property to payment of consignor's debt immaterial, 519.
ignorance of pledge immaterial, 520.
cannot claim possession until he accepts or pays draft, 528.
pledgee liable in damages for refusal to deliver upon consignee's acceptance or payment of draft, 529.
pledgee's right not divested by consignee's obtaining possession of goods without acceptance or payment of draft, nor by consignee's own delivery of goods where in trust for redemption by pledgee, 531.
CONSIGNOR. See SHIPPER.
vendor shipping at direction of consignee, acts as latter's agent, 165.
CONSTRUCTION:
rules for construing bill. See CONTRACT, CONFLICT OF LAWS.
exception fire to be strictly interpreted, 230.
of statutes relating to negotiability of bill, 452, 453, 454.
CONTEMPORANEOUS PAROL AGREEMENTS. See CONTRACT.
CONTENTS, of a bill of lading, 4.
CONTENTS UNKNOWN:
effect of phrase as affecting description of goods, 54, 55.
CONTENTS AND GAUGE UNKNOWN, effect of phrase, 56.
CONTENTS AND VALUE UNKNOWN, effect of phrase, 57.
CONTENTS AND WEIGHT UNKNOWN, effect of phrase, 59.
CONTRACT:
bill of lading is, 63.
as such cannot be varied by parol proof, 64.
nor by contemporaneous verbal agreement, 65.
verbal agreement not merged where terms are omitted by mistake, 66, 67, 68.
parol evidence admissible to explain ambiguities, 69, 70.
contract to be gathered from whole instrument, 71, 72.
reference in bill to charter party, 73, 74.
written prevail over printed provisions of bill, 75, 76.
bill construed according to intention, 77.
the bill construed with reference to usage and custom, 78, 79, 80, 81.
terms of bill varied by custom or technical meaning, 82.
usage as to course of voyage, 83.
usage in conflict with positive law, 84.
bill construed with reference to custom as to stowage, 85, 86, 87, 88.
extent to which carrier can limit his liability, 101–141.
made by agent in his own name benefits real owner, 162.
principal must adopt agent's contract as a whole, 163.
by master must be within scope of his authority, 177.
carrier may contract to carry beyond his own line, 323.
first carrier liable to destination, 325.
first carrier may limit liability to his own line, 326.

CONTRACT—(*continued*).
contract to carry beyond own line expressed or implied, 327.
what are contracts to carry "through," 331, 332.
effect of contract to forward, 333, 334, 335, 336.
carrier contracting to forward, liable to end of route, 337, 338.
liability is limited to carrier's own line by contract, 339, 340, 341.
CREW, acts of, held to be barratrous, 206, 207, 208.
CUSTOM:
rules for construing bill with reference to. See CONTRACT.
effect of, on master's authority to sign bills for goods not received, 180.
effecting deck stowage, 239.
parol evidence of agreement to carry on deck not admissible, 250.
effecting interpretation of exception perils of the sea, 271.
cannot be introduced to prove loss by rats to be considered peril of the sea, 298.
effect of on delivery of goods, 398, 399.

DAMAGE BY MACHINERY, effect of exception, 203.
DAMAGES, limitation of liability to specific sum. See LIMITATION.
DANGEROUS GOODS, stipulations in bill relating to, 243.
DANGERS OF LAKE NAVIGATION, what included in exception, 216.
DANGERS OF THE SEA, meaning of phrase, 216.
DAYS, meaning of as used in bill, 80.
DECK LOAD, carrier's liability for, 249.
DECK STOWAGE, what is meant by, 239.
DEFICIENCY IN QUANTITY, meaning of phrase, 31.
DEFINITION:
of a bill of lading, 1.
what are not bills of lading, 2.
"clean" bill, 3.
who are common carriers, 7, 10.
of the word package, 22.
act of God, 188, 189.
barratry, 205.
fire, 223.
from whatever cause, 238.
jetttison, 247.
perils of the sea, 266, 267.
ullage, 282.
who are public enemies, 292.
restraint of princes, 304.
DELAY:
and act of God concurring, 196.
freezing after delay, 235.
by preceding carrier, 236, 237.
caused by strike, 313.
by an armed mob, 314, 315.

DELIVERY:
stipulations relating to, 382 *et seq.*
surrender of the bill before delivery of goods, 397.
effect of custom on delivery of goods, 398, 399.
delivery by vessel at wharf, 400, 401, 402, 403, 404, 405, 406.
wrong delivery by a vessel, 407, 408, 409.
delivery by carrier on land, 410.
place of delivery, 411.
time of delivery, 412.
acceptance by consignee, 413.
person to whom delivery is to be made, 414.
effect of marks on goods upon stipulations in bill, 415.
delivery of bill is delivery of goods within statute of frauds, 420.
when carrier need require no indorsement of bill, 495.
indorsement of the bill must accompany delivery to pledgee to defeat right of stoppage, 547.
DELIVERY TO CARRIER:
bill not conclusive evidence of delivery, 15, 16.
is *prima facie* evidence of such delivery, 17.
effect of bill executed before reception of the goods, 18.
DEMURRAGE:
stipulation as to payment of in bill, 355.
effect of, 355.
liability for where bill contains no stipulation, 356.
provision in charter party as to, 357.
DESERTION OF SEAMEN, loss by, not covered by exception perils of the sea, 272.
DEVIATION, and act of God concurring, 197, 198.
DRAYMEN are common carriers, 9.

EARTHQUAKE, loss by, is by act of God, 190.
EMBARGO. See RESTRAINT OF PRINCES.
disregarding an embargo is barratrous act, 206.
EMBEZZLEMENT:
loss by is not covered by exception owner's risk, 261.
exception perils of the sea, 272.
ENDORSEMENT:
shipper's assent to limitations endorsed, not presumed, 157.
assent is presumed where shipper familiar with terms, 158.
where bill is endorsed in blank, no title is vested until blank is filled, 480.
ENEMIES OF THE STATE. See PUBLIC ENEMY, 292.
ESCAPES, meaning of phrase, 217, 218, 219, 220, 221, 222.
EVIDENCE:
parol evidence admissible to explain ambiguities in bill, 69, 70.
cannot vary contractual terms of bill, 64.
EXECUTION of bill of lading. See AGENT, MASTER.

EXPLOSION:
loss by is not by act of God, 192.
fire caused by is within exception fire, 224.
EXPLOSION OF BOILER, loss by not covered by exception perils of the sea, 272.
EXPRESS COMPANIES are common carriers, 8.
EXPRESSIO UNIUS, ETC., meaning of phrase, 184, 185, 186, 187.

FACTOR. See AGENT.
FIRE:
loss by, is not by act of God, 192.
not included in exception act of God, except lightning, 223.
under exceptions unavoidable dangers, perils of the sea, 223.
what is loss by, 224.
incident to other loss exception does not apply, 225.
exception does not relieve from negligence, 226.
burden of proving loss within exception, 227, 228, 229.
exception to be strictly interpreted, 230.
coextensive with liability, 231.
legislation affecting exception, 232, 233.
is not included in exception perils of the sea, 272.
FLOOD, loss by, is by act of God, 190.
FORWARD, effect of contract to forward, 333, 334.
FORWARDER:
must follow shipper's instructions, 335.
in absence of instructions must forward by usual conveyance, 336.
carrier contracting to forward is liable to end of route, 337.
cannot escape liability by calling himself forwarder only, 338.
FRAUD:
terms of bill may be avoided or modified by showing fraud in execution of bill, 68.
FREEZING:
loss by, is by act of God, 190.
effect of exception, 234.
after delay, 235.
by preceding carrier, 236.
FREIGHT:
is the consideration paid for transportation, 12.
reduced freight good consideration for diminishing carrier's common law liability, 101.
master cannot sign bills for lower rate than ship-owner contracted for, 179.
has no authority to make freight payable to any other than the owner, 179.
receipt of full freight to point of delivery held evidence of through contract, 331.
effect of clause privilege of reshipping on second carrier's lien for freight, 354.

FREIGHT—(*continued*).
effect of stipulations in bill as to, 359.
effect of clause "Freight charges paid through" on right of last carrier to his lien, 360.
lien for freight lost if goods were injured by carrier's negligence, 361.
goods of one shipper not liable for charges on goods of another if shipped under same bill, 362.
lien for freight and charges not invalid because carrier claims more than is due, 362.
person to whom payable, 363.
consignee not liable where bill is indorsed to other parties, 365.
person by whom payable, 364, 365, 366, 367, 368.
effect of clause "He (the consignee) paying freight" and similar clauses, 369.
effect of clause "Delivery upon payment of freight," 370.
refusal to give bill unless freight be previously paid, 371.
amount of freight due, 372.
payable upon "net weight delivered," 373.
promise to pay reasonable freight implied by law, 374.
not necessary to specify amount in bill, 374.
right to set off damages against claim for freight, 375.
for goods delivered short of destination, 376.
for goods underclassed, 377.
when due, 378, 379.
specific stipulations contained in bill judicially construed, 380, 381.
FREIGHT CHARGES PAID THROUGH. See FREIGHT.
FREIGHT PAYABLE IN LONDON, testimony to show meaning of, inadmissible, 70.
"FREIGHT SAME AS LOWEST, TO POINTS NAMED," meaning of phrase, 381.
FROM WHATEVER CAUSE:
definition of, 238.
synonymous with owner's risk, general release, inevitable accident, 238.
FROM WHATEVER CAUSE ARISING:
extent to which phrase relieves carrier, 101.

GENERAL RELEASE. See FROM WHATEVER CAUSE.
GOOD CONDITION. See GOOD ORDER, etc.
to hold final carrier for injury, delivery to first carrier in good condition must be shown, 346.
goods shipped in good condition presumed to remain so until delivery to final carrier, 347.
GOOD ORDER AND CONDITION:
effect of phrase, 43.
refers to external condition, 44, 45, 46.
statement of condition not conclusive, 47, 48.

GOOD ORDER AND CONDITION—(*continued*).
statement is *prima facie* evidence of condition and puts onus on carrier to disprove, 49.
effect of promise to deliver in good condition, 50.
effect of phrase "apparent good condition," 51, 52.
GOODS CARRIED ON DECK AT SHIPPER'S RISK, meaning of, 239.

HEAT, the result of defective stowage, 242.
HEAT, SUFFOCATION, effect of exception, 241.
HIGH WIND, loss by, is by act of God, 190.
HOGS, injury to, by heat or suffocation, 240.
HOLDER:
of bill not bound to give notice of his title, 427.
bill-holder's title not validated by want of notice to carrier by true owner, 465, 466.
rights of holder, of different parts of bill issued in sets, 455, 456, 457, 458, 459.

INDIANS, are public enemies, 292.
INDORSEE. See PLEDGEE.
INDORSEMENT, transfer of bill by, 493.
INEVITABLE ACCIDENT. See FROM WHATEVER CAUSE.
INHERENT NATURE OF GOODS, carrier is not liable for loss the result of, 279.
INJURIES TO UNRULY ANIMALS. See LIVE STOCK.
INJURIOUS EFFECT OF OTHER GOODS:
meaning of stipulation, 243.
loss by, not covered by exception perils of the sea, 272.
INJURY TO PERISHABLE GOODS, meaning of phrase, 279, 281, 282.
INLAND NAVIGATION, effect of exception perils of the sea in, 268.
INSURABLE INTEREST, bill is evidence of, in cargo in prize courts, 418, 419.
INTERMEDIATE CARRIER. See CARRIER.

JETTISON:
effect of exception, 247.
effect of negligence in case of loss by, 248.
effect of exception in respect to goods carried on deck, 250.

KING'S ENEMIES. See PUBLIC ENEMY, 292.

LACK OF FOOD AND WATER, meaning of exception, 254.
LAW OF THE COURT, how applicable to questions arising on bills, 99.
LEAKAGE:
meaning of exception, 251.
effect of negligence on exception, 252.

LEGAL PROCEDURE. See RESTRAINT BY.
LEX FORI, how applicable to questions arising on bills, 99.
LEX LOCI CONTRACTUS, when applicable to terms of bill, 89.
LEX LOCI SOLUTIONIS, when applicable to terms of bill, 89.
LIABILITY, limitation of, to specific sum. See LIMITATION.
LIEN FOR FREIGHT. See FREIGHT.
LIGHTNING:
loss by, is by act of God, 190.
fire by, covered by exception act of God, 223.
is not a peril of the sea, 274.
LIMITATION:
right of carriers to limit their common law liability in England, 100.
reduced freight good consideration for diminished liability, 101.
rules laid down by Federal Courts, 103, 104.
the rule as laid down in the several states, 105–141.
of liability to a specific amount by notice and advertisement, 142, 143.
of liability to specific amount by terms of bill, 144.
benefit of limitation to specific amount to carriers other than the one giving the bill, 145.
effect of limitation to specific amount where shipper is silent as to real value, 146.
effect of limitation to specific amount where several articles are included in one package, 147.
limitation to specific amount does not relieve from negligence, 149.
of carrier's liability by secret instructions to agent, 172.
effect of stipulation when claim for loss to be made within limited time, 386, 387, 388, 389, 390.
claim to be made in 30 days held reasonable, 393, 394.
claim to be made at a particular office, 391.
LIVE STOCK:
are carriers of animals common carriers? 217.
effect of clause "lack of food and water" in bill, 254.
effect of exception "owner's risk," 263.
LOADING OR UNLOADING:
effect of phrase, 255.
obligation to furnish suitable means of, 256, 257, 258.
stipulation as to loss does not apply to delivery to wrong person, 414.
LOSS BY DECAY, meaning of phrase, 279, 281, 282.
LOSS BY DETERIORATION, meaning of phrase, 279, 281, 282.
LOSS BY PIRATES. See PIRATES.
LOSS BY RATS. See RATS.
LOSS BY ROBBERY. See ROBBERS AND THIEVES.
LOSS BY VERMIN. See VERMIN.
LOSS ON THE LAKES, does not include loss of goods in a wharf-boat, 274.
LOSS OR DAMAGE, claims for non-delivery not covered by, 392.
LOSSES BY PUBLIC ENEMY. See PUBLIC ENEMY.

MARKS:
on packages copied in bill cannot contradict terms, 72.
obligation of shipper to mark plainly, 259.
effect of exception on obliteration of marks, 259.
effect of receipt of goods marked to be delivered beyond carrier's own line, 328, 329.
effect of marks on goods upon stipulations in bill, 415.
MASTER:
need not sign as such if so described in body of bill, 176.
authority of, to sign bills, 176.
contract of, must be within scope of his authority, 177.
secret instructions to, do not bind shipper, 178.
cannot sign bills for lower rate than ship-owner contracted for, 179.
has no authority to sign bills for goods not received, 180, 181.
personal liability of, under bill, 183.
what is barratry, 205.
acts held to be barratrous, 206, 207, 208.
obligation to protect goods after damage by collision, 214.
duty to open packages in order to save damaged goods, 286.
duty in regard to sale of injured goods, 287.
master should communicate with owners, 288.
is entitled to receive freight, 363.
has no power to draw bills making freight payable to other than the owner, 363.
MISDESCRIPTION:
of goods in bill, 19.
inducing less degree of care, 20, 21, 22.
to secure lower rate of freight, 23.
by the carrier, 24.
MISTAKE, omission of terms of bill by, 66.
MOB, fire caused by, 229.
MONEY, receipt of, by master binds owner, 178.
MORE OR LESS, effect of phrase, 32.
MUNIMENT OF TITLE, bill of lading is muniment of title of goods, 416.

NEGLIGENCE:
carrier cannot limit his liability for negligence, 100–141.
limitation of liability to specific sum does not relieve from, 149.
act of God and negligence concurring, 194, 195.
proof of happening of collision is not evidence of negligence, 215.
exception by fire does not relieve from, 226.
exception owner's risk does not cover loss by, 261.
causing loss in connection with perils of the sea, 275.
exceptions inherent defect, deterioration, decay, perishable goods, do not include loss from negligence, 283, 284, 285.
effect of, on exception public enemies, 295, 296.

NEGLIGENCE—(*continued*).
the first of a series of carriers may limit liability to his own line except for, 326.
lien for freight lost, if goods injured by, 361.
NEGOTIABILITY:
bill not negotiable in ordinary sense, 438.
nature of the interest for title of which bill is muniment, 439–443.
statutes relating to the negotiability of bill, 441.
construction of statutes relating to negotiability, 452, 453, 454.
rights of holders of different parts of a bill, 455, 456, 457, 458, 459.
transfer of bill by delivery containing no words of negotiability, 505, 506, 507.
NOTICE:
limitation of liability to specific amount by, 142, 143.
want of notice to carrier as to true owner does not validate the holder's title, 465, 466.

OBLITERATION OF MARKS, effect of exception, 259.
ORDER, statement of, in bill. See "Good Order," etc.
OWNER, acts of, may sometimes be barratrous, 211.
OWNER'S RISK:
extent to which the phrase relieves carrier's liability, 105.
synonymous with "from whatever cause," 238.
meaning of the exception, 260.
exception does not cover loss by negligence, 261.
effect of fraud or misrepresentation, 262.
effect of exception on carriage of live stock, 263, 264.
construction of exception in English Courts in respect to carriage of live stock, 264.

PACKAGE:
definition of, 22.
effect of limitation to specific amount where several articles are included in one package, 147.
PAROL PROOF, bill cannot be varied by, when regarded as a contract, 64.
PARTIES, who are original parties, 5.
PERILS OF THE SEA:
such exception does not make a ship-owner liable for loss by fire by negligence. Act of Congress 3d March, 1851, 81.
injuries to live stock covered by, 222.
do not include loss by fire, 223.
may include loss by jettison, 247.
definition of the exception, 266, 267.
effect of exception on inland navigation, 268.
what are perils of the sea, 269, 270.
custom affecting interpretation of the exception, 271.

PERILS OF THE SEA—(*continued*).
what are not perils of the sea, 272, 273, 274.
negligence and perils of the sea causing loss, 275.
perils of the sea must be necessary cause of loss, 276.
effect of exception on goods stowed on deck, 277.
obligation to protect goods after damage by, 278.
PERISHABLE GOODS:
meaning of the phrase, 280.
right of carrier by land to sell, 289.
duty of master to open packages, 286.
duty of master in regard to sale of, 287.
PIRATES:
loss by pirates included in exception perils of the sea and king's enemies, 290.
what are losses by, 291.
are public enemies, 292.
PLEDGEE:
character of title by pledgee of bill, 509, 510.
pledgee may maintain replevin, 511.
title is paramount to right of pledgee, 512.
no title passes to pledgee unless bill is delivered, 213.
forwarding bill with draft attached not necessary, 514, 515.
delivery to party discounting draft, 514, 515.
pledgee's rights paramount to those of consignee, 516, 517.
pledgee's rights paramount to those of consignee to whom consignor is indebted for value of goods, 518.
agreement between consignor and consignee at shipment, 519.
consignee's ignorance of pledge immaterial, 520.
pledgee's title conditional, 521.
pledgee's title conditional whether transaction is mortgage or pledge, 522.
pledgee's title to be defeated by acceptance rather than payment of draft, 523, 524.
also where draft has been sent to agent for collection, 525, 526.
bill may be made security for payment by express agreement, 527.
consignee can claim possession until he accepts or pays draft, 528.
pledgee is liable in damages for refusal to deliver upon consignee's acceptance or payment of draft, 529.
pledgee's right not divested by consignee's obtaining possession without acceptance or payment, 530.
nor by consignee's own delivery of goods where in trust for redemption by pledgee, 531.
transfer of bill to pledgee and advance of money need not be absolutely contemporaneous, 542.
PRIMAGE AND AVERAGE ACCUSTOMED, construction of the phrase, 358.
PRIVATEERS are public enemies, 292.

PRIVILEGE OF RESHIPPING:
effect of the clause, 351.
in case of low water, 352.
PRIZE COURTS, bill of lading is evidence of insurable interest in cargo in prize courts, 418, 419.
PROXIMATE CAUSE, when act of God is, 193.
PUBLIC ENEMY:
is not excluded from exception by expressed exceptions, 184.
may include loss, by jettison, 247.
pirates are, 292.
who are public enemies, 292, 293.
what are not losses under the exception, 294.
exception will not avail in case of negligence, 295.

QUANTITY:
statement of, only *prima facie* evidence of amount between original parties, 25.
carrier not bound by statement, 26, 27, 28.
shipper not bound by statement, 29.
consignee not bound by statement, 29.
effect of statement on burden of proof, 30.
QUANTITY AND QUALITY UNKNOWN, effect of phrase, 60.
QUANTITY GUARANTEED:
meaning and effect of, 31.
construction of phrase, 82.
QUANTITY UNKNOWN, effect of phrase, 53.
QUEEN'S ENEMIES. See PUBLIC ENEMY.

RAILROADS are common carriers, 7.
RAINY DAYS, testimony admissible to show in what sense words were used in bill, 69.
RATS:
loss by, not covered by exception perils of the sea, 272.
meaning of the exception, 298.
not included in perils of the sea, 298.
RECEIPT:
bill is a receipt, 14.
as a receipt may be varied by parol between original parties, 14.
is receipt for goods delivered to carrier, 17, 18.
for goods improperly described, 19.
for specific weight or quantity only *prima facie* evidence as between original parties, 25, 26, 27, 28, 29, 30.
for quantity guaranteed, 31.
effect of phrase "more or less," 32.
in bill containing statement of value, 33 *et seq.*
statement of value, 33.

RECEIPT—(*continued*).
effect of qualifying clauses in bill of, quantity, quality, contents or value unknown, 53 *et seq.*
REPLEVIN:
pledgee of bill has such property in goods as will enable him to maintain replevin, 511.
REPRESENTATION, bill cannot represent goods unless issued to true owner, 461.
RESHIPPING. See PRIVILEGE OF RESHIPPING.
RESTRAINT BY LEGAL PROCEDURE:
necessity for such exception, 300.
obligation of carrier when legal seizure is made, 301, 302, 303.
RESTRAINT OF PEOPLE. See RESTRAINT OF PRINCES.
RESTRAINT OF PRINCES:
definition of, 304.
seizure under custom laws within the exception, 305.
embargo, blockade, and neutrality edicts within the exception, 306–308.
effect of delay by quarantine regulations, 309.
synonymous with restraint of people, 310.
RIOTS, STRIKES, AND STOPPAGES OF LABOR:
meaning of the exception, 311, 312.
delay caused by strike, 313.
by an armed mob, 314–316.
RISK OF BOATS, meaning of the exception, 317.
ROADS, meaning of, when used in bills, 216.
ROBBERS AND THIEVES, meaning of the exception, 319, 320.
RUST, effect of the exception, 321.

"SAID TO CONTAIN," meaning of phrase, 42.
SEWING MACHINES, are not properly described as hardware, 23.
SHIFTING OF A BUOY, loss by, not covered by exception perils of the sea, 272.
SHIP, the law of, when applicable to bills of lading, 97.
SHIP BROKER, authority to sign bills of lading, 182.
SHIP OWNERS, are common carriers, 9.
SHIPPER:
effect of limitation to specific amount where shipper is silent as to real value, 146.
acceptance of bill by, assent to its terms, 150.
should read bill before accepting it, 151.
assent of shipper must be proved in Massachusetts, 152.
in Illinois, 153.
statutory enactment as to acceptance in Dakota, 154.
rule as to assent of shipper in Georgia, Michigan, Maryland, Ohio, 155, 156.
secret instructions to master do not bind shipper, 178.

SHIPPER—(*continued*).
consent of, to deviation, 199.
effect of consent to have goods carried on deck, 249.
obligation to mark goods plainly, 259.
not liable for freight charges on goods of another though shipped under same bill, 362.
promise to pay reasonable freight implied by law, 374.
right to set off damages against claim for freight, 375.
freight for goods delivered short of destination, 376.
under-classed by shipper, 377.
where bill is issued for delivery to shipper's order, carrier bound to deliver to no one without order, 414.
shipper's property is sufficient to enable him to maintain action for failure to deliver goods, 476.
making goods deliverable to shipper's order *prima facie* evidence of intention to reserve *jus disponendi*, 482–484.
presumption strengthened when bill is pledged to secure draft, 485.
shipment in vendee's vessel does not conclusively rebut presumption of reserved control, 487, 488.
reservation of *jus disponendi* question of intention, 489, 490.
where consignee is consignor's factor, 491, 492.
SNOW STORM, loss by, is by act of God, 190.
SPECIFIC AMOUNT, limitation of liability. See LIMITATION.
STATION AGENT, authority of, to contract for carriage of goods beyond line, 175.
STOPPAGES OF LABOR. See RIOTS.
STOPPAGE IN TRANSITU:
title of pledgee in bill is paramount to right of stoppage, 512.
the right not general, 532.
defeated by transfer of bill for value, 533–535.
not defeated where transfer is fraudulent, 536.
transferee's knowledge of vendee's insolvency or that the goods were not paid for, 537.
consideration for the transfer where bill-holders may defeat the right, 538, 539, 540, 541, 542, 543.
right of stoppage not defeated unless bill is transferred, 547.
notice of stoppage after vendee's transfer, 548.
STORM, loss by, is by act of God, 190.
STOWAGE:
bill construed with reference to custom as to, 85, 86, 87, 88.
goods carried on deck at shipper's risk, 239.
heat or fermentation result of defective stowage, 242.
liability of carrier for careful and prudent stowage, 243.
injurious effect of other goods, 243.
dangerous goods, 243.
insufficientstowage, 243.

STOWAGE—(*continued*).
carrier's liability for deck load, 249.
presumption is, goods must be stowed under deck, 250.
effect of bill containing exception sweat or sweating, 322.
STRIKE. See RIOTS.
SUDDEN SQUALL, loss by, is by act of God, 190.
SUFFOCATION, loss by, 240.
SWEAT:
loss by, is peril of the sea, 322.
meaning of the exception, 322.
SWEATING OF THE HOLD. See SWEAT.
SYMBOL:
bill of lading is symbol or representative of goods, 417.
duration of bill's availability as symbol, 424, 425, 426.

THEFT, loss by, not covered by exception perils of the sea, 272.
THE LAW OF THE SHIP, when applicable to terms of bill, 97, 98.
THIEVES. See ROBBERS AND THIEVES.
THROUGH CARRIAGE, bill of lading not *functus officio* upon arrival of goods at termination of first stage of transit, 426.
THROUGH CONTRACTS. See CONTRACT.
TIDAL WAVE, loss by, is by act of God, 190.
TITLE:
bill of lading is a muniment of, 416.
a symbol or representative of goods, 417.
is evidence of insurable interest in prize courts, 418, 419.
bill of lading is means of transferring title, 421.
duration of bill's availability as symbol, 424, 425, 426.
holder of bill not bound to give notice of his title, 427.
bill gives title to goods received by carrier subsequently to its issuance, 436.
rule not affected by statutes prohibiting issuance of bill after receiving goods, 437.
nature of title of which bill is muniment, 439, 440, 441, 442.
bill is *prima facie* evidence of consignee's title, 471, 472, 473.
consignee *prima facie* owner though carrier be paid by consignor, 475.
consignor's title sufficient to enable him to maintain an action for failure to deliver goods, 476.
consignee may sue without delivery of bill when consignor releases title, 477.
or upon re-indorsement of bill, 478.
where bill is indorsed in blank no title is vested until blank is filled, 480.
consignment not conclusive evidence of title in consignee, 479, 480, 481.
making goods deliverable to vendor's order *prima facie* evidence of intention to reserve *jus disponendi*, 482, 483.
making goods deliverable to vendor's agent has same effect, 484.

TITLE—(*continued*).
presumption strengthened when bill pledged to secure draft, 485, 486.
shipment in vendee's vessel does not conclusively rebut presumption of reserved control, 487, 488.
reservation of *jus disponendi* question of intention where consignee is consignor's factor, 491, 492.
bill transferable by indorsement and delivery, 493.
title may be passed by other modes of assignment, 494.
title transferred by delivery of bill unindorsed, 496–501.
character of pledgee's title, 509 *et seq.*
TORNADO, loss by, is by act of God, 190.
TRANSFER:
bill is means of transferring title to goods, 421.
transfer of the bill passes such title as it was the intention of the parties to pass, 438.
duplicate receipts or bills must be so stamped, 443.
bill is transferable by indorsement and delivery, 493.
title may be passed by other modes of assignment, 494.
when carrier need require no indorsement, 495.
title may be transferred by delivery of bill unindorsed, 496, 497, 498, 499, 500, 501.
delivery must be with intent to pass property, 502, 503.
transfer of bill by delivery containing no words of negotiability, 505, 506, 507.
effect of transfer varies with intention, 508.
right of stoppage *in transitu* defeated by transfer of bill for value, 533.
right of stoppage not defeated where transfer is fraudulent, 536.
transferree's knowledge of vendee's insolvency or that goods were not paid for, 537.
consideration for transfer, 538, 539, 540, 541, 542, 543.
right of stoppage not defeated unless bill is transferred, 547.
notice of stoppage to carrier after vendee's transfer of bill, 548.
TRANSPORTATION COMPANIES, are common carriers, 9.

ULLAGE, is included in exceptions, inherent defect, etc., 282.
UNIFORM BILL OF LADING:
growth of the uniform bill, 549.
originators of the uniform bill, 550, 551.
benefits resulting from the uniform bill, 552.
form of the uniform bill, 553.
UNLOADING. See LOADING.
USAGE, rules for construing bill with reference to. See CONTRACT.

VALUE:
statement of, 33.
effect of knowledge by carrier of true value, 34.

VALUE—(*continued*).
shipper not bound to state value, 35.
legislation requiring statement to be made of value, 36.
shipper, if asked, must state value truly, 37.
shipper must not deceive as to value by manner of shipping, 38, 39, 40, 41.
VENDEE:
right of, to demand bill of lading, 422.
not entitled to all existing copies, 423.
may by indorsement of bill confer indefeasible title, 460.
VERBAL AGREEMENT:
cannot vary contractual terms of bill, 65.
not merged where terms are omitted by mistake from bill, 65.
VERMIN:
loss by, not covered by exception perils of the sea, 272.
loss by, not within exception perils of the sea, 299.
VICIOUSNESS, meaning of phrase, 217, 218, 219, 220, 221, 222.

WAGONS, the owners of may be common carriers, 9.
WEIGHT, statement of, only *prima facie* evidence of amount between original parties, 25.
WEIGHT, CONTENTS AND VALUE UNKNOWN, effect of phrase, 61, 62.
WEIGHT UNKNOWN, effect of phrase, 58.
WORMS, loss by, not covered by exception perils of the sea, 272.
WROUGHT AND UNWROUGHT, meaning of the words, 82.

LAW LIBRARY
UNIVERSITY OF CALIFORNIA
LOS ANGELES

AA 000 836 057 0